









TREATISE

ON THE

PLEADINGS

IN SUITS IN

THE COURT OF CHANCERY,

BY ENGLISH BILL.

BY JOHN MITFORD, ESQ., (THE LATE LORD REDESDALE.)

COMPRISING THE NOTES OF

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AND A LARGE BODY OF

ADDITIONAL NOTES,

BY JOSIAH W. SMITH, B. C. L.,

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SIXTH AMERICAN, FROM THE FIFTH LONDON EDITION,

WITH COPIOUS AMERICAN NOTES,

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AMERICAN EDITOR'S PREFACE.

American edition of this treatise appeared, under the supervision of Charles Edwards, Esquire. The editor of this edition has looked into subsequent American authorities, and preserved, in brackets, Mr. Edwards' notes in the form in which they appeared, excepting, where an occasional omission, transposition or slight alteration would have been deemed admissible by him.

The editor has adopted a mode of noting, which may be acceptable to the student and practising solicitor. Reporters' head notes are sometimes very inaccurate or deficient; he has therefore examined the body of the opinions of the court, and thence deduced the rule, and given in the language of the court, or in a condensed form, the principle and reason. In this way he has, so far as the time allowed for preparing the edition permitted, endeavored to follow, in some measure, the spirit in which the original work was conceived and

executed; and to save to the solicitor or counsel the necessity of groping through a long case or opinion to discover the precise point referred to, he has noted the page where it may be seen, and not merely the page of the case.

The London editor confines his notes to actual decision, as "mere dicta and opinions he thinks tend to mislead," (Pref. ix.) The American editor has not implicitly followed his course. country our system of equity pleading and procedure, are more varied and fluctuating than in England. Each state has its own system, and the United States' Courts theirs; but all are, in many respects, upon the English model. Nevertheless points are constantly arising, and the spirit of progress that demonstrates the presence and vigor of the democratic principle of our institutions, by no means diminishes the number of vexed questions that spring from the collision of free opinion, and the conflicts of our practical jurisprudence. 'Mere dicta and opinions,' therefore, of our chancellors and judges, are regarded as valuable directions to Indeed, our courts, not unfrethe practitioner. quently, volunteer direction or suggestions irrelevant to the exact issue or merits of the case, for the sole purpose of preventing useless litigation and expense. And if, as may be but rarely, such direction mislead the whole power of the court over amendment and costs, is of course, beneficially exerted to remedy the mischief.

In truth, no inconsiderable portion of Lord Redesdale's Treatise is made up of *opinion*, resting on no settled basis of approved decision, and leaning for support, amid the conflicts of law on an intricate science, solely upon his own sound and discriminating judgment. Nevertheless, and as remarked by the chancellor, in *Bogardus* v. *Trinity Church*, 4 *Paige's R*. 195, "His *opinion* upon a case of equity pleadings, is always esteemed the highest authority."

This allusion to the high authority of Lord Redesdale, is not singular. In England, his treatise is "received by the whole profession, as an authoritative standard and guide." It was regarded on its appearance, and characterized by one of the most scrupulously hesitating, yet able chancellors of England, as "a wonderful effort." (See Pref. to the present London ed., vii., viii.)

In the United States, it has been esteemed, by the courts and profession, ever since its introduction, a standard authority, so far as its principles applied to our peculiar judicial organizations. "Lord Redesdale, in his excellent Treatise on Equity Pleadings," is the usual mode of quotation

Like Blackstone, Mitford has become a legal classic. A strict analysis of both these eminent authors, would, most unquestionably, disclose some defects of arrangement. Very few writers, not excepting those who have attempted to remedy the presumed defects of Blackstone and Mitford, could bear a strict scrutiny into their own substitutions: and, notwithstanding Sergeant Stephens has attempted to remodel the former, and Justice Story has incorporated, under a new arrangement, the greater part of the latter, yet, the admirers of legal genius will still seek the identical Blackstone and Mitford, in their original arrangement.

In New-York, a radical re-construction of the judiciary system, has recently taken place, and a code of procedure adopted. The formal parts of Equity Pleading are abrogated. But the principles of Equity Pleading, interwoven as they are with every lucid development of the merits of a complaint or defence, are unaffected by those reforms, and must remain as an essential part of a skilful practitioner's knowledge, in presenting a concise and correct statement of the premises, on which relief is asked, or of the defence by which such relief is resisted.

J. W. M.

New-York, May, 1849.

PREFACE

TO THE

FIFTH LONDON EDITION,

By JOSIAH W. SMITH, Esq.

THE fourth edition of this admirable Treatise was published in the year 1827. The long interval which elapsed before it became out of print is partly to be attributed to the fact that the demand for a work on equity pleadings is almost entirely limited to the Chancery Bar, and partly to be ascribed to the publication of other works on the subject, which had the advantage of containing many cases reported since the publication of the fourth edition of this Treatise. The interval above alluded to had no connexion with the existence of any unfavourable opinion of this work, either when viewed by itself, or when compared with any more recent production; for, as the work was originally characterized by Lord Eldon as "a wonderful effort to collect what is to be deduced

from authorities, speaking so little what is clear;"* so, it was truly remarked by Sir Thomas Plumer, that this book "has ever since been received by the whole profession as an authoritative standard and guide;"† and the same remark is equally applicable to it at the present time.

This edition is reprinted verbatim from the fourth edition, including the references and notes added thereto by George Jeremy, Esq., of Lincoln's Inn, which are printed in double columns under the text. The additions by the present editor consist of a Marginal Analysis, of Notes printed across the page, under Mr. Jeremy's notes, and of a long Note on Parties, for which the end of the volume was considered the more convenient place.

The present editor's notes comprise the enactments and orders, relating to the subject of equity pleading, which have been made within the period extending from the beginning of the year 1826, which was shortly before the publication of the fourth edition, down to the present time with the decisions reported within the same period, whether in the octavo Reports, the Law Journal, or the Jurist, to the number of about six hundred.

The endeavour of the editor has been, to divest the cases of those particulars which are of no use to the student, and have no essential relevancy to the matters with reference to which such cases are consulted by the practitioner, and to accomplish the difficult task of moulding the essential parts of the cases, and the reasons of the decisions, where any are expressed, into succinct yet clearly expressed propositions, placita, or rules, in such a way as to exhibit the points and principles of pleading which the decisions in those cases serve to establish.

He hopes that the notes he has added will be found to consist of a precise and perspicuous enunciation of what may be relied on as matter of actual decision. Mere dicta and opinions he has passed by, as too often tending to mislead. He has also for the most part abstained from stating general propositions founded on a small number of particular cases, as liable to the same objection. And while he has avoided giving the cases in the narrative or statement form, comprising names, dates, and other unnecessary particulars, he has still endeavoured to preserve, in the terms of the placita, the essential, specific features of each case, because, if he had not, such placita would not acquaint the practitioner with the degree of resem-

blance or material difference between the cases from which they are derived and the cases occurring in practice with reference to which they may be consulted. The following quotations may suffice as illustrations of the propriety of the course thus pursued: "That case, so far as it applies to the present, was a mere dictum. The decision itself is not applicable."*—" The words attributed to me were not necessary for the purpose of the decision: and nothing except the decision is authority which binds."†-" It is true that the dictum of Lord Cottenham is more generally expressed; but all dicta should be construed according to the circumstances of the case in which they are found." ‡-" It is very difficult to say that these particular cases could have been decided otherwise than they were; but the marginal notes go much further than the judgments." §

At the time when the following Treatise was written, the books on equity jurisprudence or jurisdiction and on equity practice were of a very meagre kind; and on this account there are parts

^{*} See Sloman v. Kelly, 4 Y. & C. Eq. Ex. 172.

[†] See James v. Herriot, 5 Law J. (N. S.) Ch. R., 133; and compare Bedford v. Gates, 4 Y. & C. Eq. Ex. 21, with Kimber v. Ensworth, 1 Hare, 293.

[‡] Alderson, B., in Davies v. Quarterman, 4 Y. & C. Eq. Ex. 722,

[§] Wigram, V. C. in Malcolm v. Scott, 3 Hare, 63. And see Sharpe v. Tayler, 11 Sim. 50; and Barnard v. Laing, 6 Jur. 1050.

of this work which relate to jurisprudence or jurisdiction and practice, rather than to pleading. Of course the notes of the present editor are almost exclusively confined to pleading, as that is the proper subject of the book, and as the other subjects now occupy a vast space, and have been separately and ably discussed by other writers.

In extenuation of any inaccuracies and defects which may exist notwithstanding the great care which has been bestowed by him, he must plead a pressure of professional business towards the close of his editorial labors, which rendered it an extremely arduous and exhausting effort finally to complete his notes, and to superintend the printing of the volume.

J. W. S.

8, Old Square, Lincoln's Inn.



PREFACE

TO THE

FOURTH LONDON EDITION,

BY GEORGE JEREMY, Esq.

LORD REDESDALE having honoured me with that confidence which was necessary to my superintending a new edition of the following highly valuable work, I proposed to examine the authorities cited in the last edition of it, and to add the references to such new cases as might appear to me to elucidate the subject, a plan in which his Lordship was pleased to concur. In the additions accordingly made by way of note, I have endeavoured, for the most part, to confine myself to the mere citation of authorities, generally selecting those of the latest date; although I have in some instances, where the decisions did not directly sustain or precisely apply to his Lordship's propositions, but where, nevertheless, notice of them seemed material, made such remarks as were necessary to their introduction. In these respects I have been led into greater detail than was originally intended; but it is hoped that the practical utility of the present publication will be thereby increased. In referring to the authorities, I have made the distinction, which it is now usual to adopt, between decisions and dicta, by citing the name of the case in the one instance, and the page of the report in the other. I have also deemed it expedient to render the index more copious and precise. His Lordship has made some few additions and alterations in the text, but I have not been instrumental in withdrawing from the Profession any part of the work itself. And here I may be permitted to remark that it has been a subject of great interest to me, in the course of my inquiries, to perceive that this work, which in its outline and substance was the original treatise upon equity pleading, has from the time of its first publication been so far the guide to subsequent decisions as to have rendered any material correction, or even qualification of the general principles explained in it, wholly unnecessary. G. J.

1, New Square, Lincoln's Inn.

LORD REDESDALE'S PREFACE

TO

THE THIRD EDITION.

THE materials from which the first edition of this Treatise was compiled were not very ample or satisfactory; consisting, principally, either of mere books of practice, or of reports of cases, generally short, and in some instances manifestly incorrect and inconsistent; and the author had had little experience to enable him to supply the deficiencies of those materials. The communication of information, and the assistance of experience, were earnestly solicited by the preface to that edition, but with little effect. Four-and-thirty years have since clapsed; and when, at the distance of seven years from the first publication, the second edition was prepared for the press, such observations as had occurred to the author in practice, and such notes as he had collected, were the principal means of improvement which he possessed; and he was then too much engaged in business to give that attention to the subject which it required. Nearly eight-and-twenty years have

since passed; and many volumes of reports have been published, and some treatises have appeared (particularly those by Mr. Fonblanque and Mr. Cooper), from which much assistance might have been derived. During the greater part of this period the author was not only unwilling to engage in the labor of preparing a new edition, but disabled, by various avocations, from attempting to make any important additions. Long absence from the bar, the consequent want of the habits of practice, age, the enjoyment of repose, and the indolence which that enjoyment too often produces, have increased his unwillingness to undertake a work of labor; and that which is now offered is little more than a republication of the second edition, with references to some cases since reported; a few additional notes of cases not reported; some corrections of apparent errors; and some extension of parts which appeared to have been most imperfectly treated in the former editions. therefore far from satisfactory to himself; and would not have been now given, if he had not been assured that even a republication of the last edition, with all its imperfections, was desired by the Profession.

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INTRODUCTION.

Of the extraordinary jurisdiction of the Court of Chancery; and of the manner in which suits to that jurisdiction are instituted, defended, and brought to a decision.

THE Chancery of England has various offices and Ordinary and jurisdictions. The most important jurisdiction is extraordinary jurisdictions of that which it exercises as a court of equity, usually chancery styled its extraordinary jurisdiction, to distinguish it from those which are termed its ordinary jurisdictions, and are chiefly incident to its ministerial offices, and the privileges of its officers.

The exercise of this extraordinary jurisdiction by Equitable juriscourts distinct from those usually styled courts of diction exercised by distinct common law, to which the ordinary administration of liar to this counjustice in civil suits is intrusted, seems to be, in a great degree, a peculiarity in the jurisprudence of the country, but pervading the whole system of its judicial polity. . The origin of these courts is involved in Origin and jurisgreat obscurity (1); their authority has been formerly diction of these courts.

⁽¹⁾ On this subject, see Mr. Spence's very learned work on "The Equitable Jurisdiction of the Court of Chancery."

The history, jurisdiction, organization and practice of Equity Courts, in England and in the United States, are the subjects of numerous volumes, since Mitford's treatise was written. " At the time it was

[2]

questioned, and the subjects and limits of their jurisdiction were then but imperfectly ascertained. Time

written, the books on equity jurisprudence or jurisdiction, and on equity practice, were of a very meagre kind," and to this account the English editor ascribes parts of this work which are foreign from its proper subject—pleading; and to this he has of course, almost exclusively confined his notes. (Pref. vii.)

So far as the question of jurisdiction over parties and matters in controversy, is connected with the pleadings, it necessarily forms an appropriate subject of attention, as will appear in the sequel. The undefined character of equity power in many of the State Courts in the United States, often gives rise to that question. Indeed these courts are so varied in the nature and extent of their equity jurisdiction, as to have been classified under four heads. 1. Those in which equity is administered in a court entirely distinct from the common law courts, as in New Jersey, Delaware, South Carolina and Mississippi; 2. Partially so, as lately in the court of chancery of New York, and by the circuit judges acting as vice chancellors; and in Maryland, Virginia, Missouri; 3. Where the jurisdiction at common law and the general powers of equity are vested in one tribunal, as in New York, since its chancery court was abolished, and in Vermont, Connecticut, North Carolina, Georgia, Ohio, Indiana, Illinois, Kentucky, Tennessee, Alabama; 4. Where no general chancery powers are exercised by any of the state courts, as in Massachusetts, Maine, New Hampshire, Rhode Island, Louisiana and Pennsylvania. (See Intro. to Barbour & Harrington's Equity Digest.) This classification, which may in a few instances, by the recent adoption of new state constitutions, be susceptible of some modification, shows at least the diversity of equity jurisdiction in this country.

Under the last class in Massachusetts, certain equity powers have, from time to time, been conferred upon the supreme judicial court of that state. Here, as in similar courts of like limited powers, the question of jurisdiction has not unfrequently arisen on statutory interpretation, and the construction of incidental powers. Though it is now well established in that state, that the court will not take cognizance of any subject matter or case in equity, unless they are authorized expressly so to do by statute; yet it is equally well established that when the court has jurisdiction of any subject matter or case in equity, it is clothed with full and ample power, and generally, will proceed in the same manner as courts of similar jurisdiction do in England. (Washburn v. Goodman, 17 Pickering's Rep. 529. 519.) But where it has no original jurisdiction of the matter or case, it assumes none by virtue of any general equity power. Hence it has been decided, that it has no jurisdiction over an equitable mortgage: as where a deed was

has given them full establishment, and their powers and duties have become fixed and acknowledged.

given and a written promise, not under seal, delivered back, to reconvey on repayment of the consideration money. (Eaton v. Green, 22 Pick. Rep. 526. 529, et seq.) Nor has it jurisdiction in equity over a direct charge of fraud. When on other grounds it has jurisdiction of the cause, and a fraud is brought in question as incidental, the court must inquire into and decide it, as any other question which might be incidentally put in issue in the progress of such a cause. (Fiske v. Slack, 21 Pick. Rep. 366. 361. Holland v. Cruft, 20 id. 321.) Nor has the general power of reforming contracts, as a distinct branch of equity jurisdiction been conferred on that court. (Babcock v. Smith et al., 22 Pick. Rep. 61.)

The courts of the United States, like the state courts under the third head of the above classification, exercise a jurisdiction of mixed equity and law, not regulated by state legislation nor practice. The general rule is, that remedies in respect of real estate accord to the law of the place. The lex loci rei site may be satisfied by construing local statutes so as to give validity to title, leaving the lex fori to regnlate the remedies to enforce such title. But the remedies in the United States courts are, by interpretation of the judiciary act, conformed to the English principles of equity and common law, not to the peculiar practice of the state courts. Their equity jurisdiction and jurisprudence are coincident and coextensive with the English, and are not regulated by the municipal jurisprudence of the state where the court sits; and their practice is based on that of the court of chancery in England, not the court of exchequer. (Roberson v. Campbell, 3 Wheat. 212. 4 Cond. Rep. 238-9. 235, and note p. 240. Vid. U. S. v. Howland, 4 Wheat. 108. 4 Cond. Rep. 404. 408, n. Fletcher et al. v. Morey, 2 Story's Rep. 567. 553. Smith v. Burnham, 2 Sumner's Rep. 625.) Hence, as their general equity jurisdiction is not controlled nor limited by state legislation, it is no objection that there is a remedy by the latter. (Gordon v. Hobart, 2 Sumner's Rep. 403. 401.) (See further on the equity jurisdiction of the United States and state courts, original, appellate, concurrent and assistant; and the manner in which suits are instituted, defended, and conducted to a decision here: Kent's Commentaries. Story's Com. on the Constitution and on Equity Juris. Conklin's Treatise. Barbour's Practice. Graham on Jurisdiction. Note of Amer. editor to 5 Amer. ed. of Mitford, p. 19, n. (1).)

The principles, rules and usages of the high court of chancery of England, have supplied the model also, of equitable procedure in the state courts, of which some, as New York and Massachusetts, have by rule, adopted the English, as the outlines of their practice, so far as

If any doubt on the extent of their duties has occurred of late years, it has principally arisen from the li-

it is not repugnant to state constitution, laws, and rules of court. (See in Massachusetts, 24 Pick. Rep. 419. 34.) But these have introduced in some instances, (such as in suits for foreclosure and sale, partition, divorce cases, judgment creditor suits, and some others,) modes of equitable remedy and procedure, either entirely unknown or materially variant from the English chancery system. "The most general "description of a court of equity is, that it has jurisdiction in cases "where a plain, adequate and complete remedy cannot be had at law-"that is, in the common law courts. The remedy must be plain; for "if it be doubtful and obscure at law, equity will assert a jurisdiction. "So, it must be adequate at law; for if it fall short of what the party "is entitled to, that founds a jurisdiction in equity. And it must be "complete-that is, it must attain its full end at law; it must reach "the whole mischief, and secure the whole right of the party, now "and for the future; otherwise equity will interpose and give relief. "The jurisdiction of a court of equity is sometimes concurrent with "that of courts of law; and sometimes it is exclusive. It exercises "concurrent jurisdiction in cases where the rights are purely of a legal "nature, but where other and more efficient aid is required than a "court of law can afford, to meet the difficulties of the case and insure "full redress. In some of these cases, courts of law formerly refused "all redress, but now will grant it. But the jurisdiction having been "once justly acquired, at a time when there was no such redress at "least it is not now relinquished." (See the article from which the above is extracted, in Encyclopedia Americana, and approved by Professor Amos in his lecture upon "What are Courts of Equity?" and editor's note to 5 Amer. ed. p. 25, n. (1).)

But the court of chancery will not refuse jurisdiction of a case merely on the ground that complainant has a perfect remedy at law, if the parties have submitted themselves to the jurisdiction of the chancellor without objection. In such case when the parties expressly stipulate to waive the objection and submit the case, the court will apply the maxim, modus et conventio vincunt legem, even to a question of jurisdiction. (Bank of Utica v. City of Utica, 4 Paige Rep. 400-1.)

Mr. Story, however, says, (Equity Pl. c. 2, § 10, 4 ed. p. 9,) that "consent cannot confer a jurisdiction not vested by law." This would perhaps be more particularly applicable to courts, such as the supreme judicial court of Massachusetts, whose equity powers have been dealt out to the court from time to time by statute. Beyond the limits thus prescribed, it may be that "every excess would amount to a usurpation which would make its decretal orders a nullity, or infest them

berality with which the courts of common law have noticed and adopted principles of decision establish in courts of equity; a liberality generally conducive to the great ends of justice, but which may lead to great inconvenience, if the whole system of the administration of justice, by courts of equity, the extent of their powers and means of proceeding, the subservience of their principles of decision to the principles of the common law, the preference which they have allowed to common-law rights where in conscience the parties have stood on equal grounds, and the defect in the powers of the court of common law arising from their mode of proceeding, should not be fully considered, in all their consequences (a).

(a) See Lord Hardwicke's judgment in Wortley and Birkhead, 2 Ves. 573, 574. And see 6 Ves. 39.

with a ruinous infirmity." (Ib.) But where courts of equity have long existed, or are created with the usual general powers of such courts, it might not be easy, in all cases, to define with exact precision what jurisdiction the law has conferred; and it might readily be conceived that consent to waive any objection on that ground, might sometimes be recognized on the principle of the maxim in the above case. The court will not in first instance assume jurisdiction where it is clear that it has none. Such, at least, is the doctrine of the present day; notwithstanding the history of the English courts, whence our own shows a long series of conflicts of jurisdiction, and reciprocal "usurpations," until the concurrent and assistant jurisdiction of chancery, and the equity of the law courts, have, through the aid of the semi-legislation of the judiciary, very much confounded the original boundaries of their respective jurisdictions; and in New York, by recent constitution and enactment, the jurisdictions are at last blended, and an uniform mode of procedure established. But where such is not the case, the court will not become the instrument of fraud, or lend its aid so as to enable a party to defeat his own deliberate act, or take advantage of his own wrong, who has expressly stipulated to waive objection and submit his case where a question of jurisdiction might have otherwise been raised, if interposed in due time and form.

Objects of municipal law. In the construction of every system of laws, the principles of natural justice have been first considered; and the great objects of municipal laws have been, to enforce the observance of those principles, and to provide a positive rule where some rule has been deemed necessary or expedient and natural justice has prescribed none. It has also been an object of municipal law to establish modes of administering justice.

3 [3]
Origin of the distinction between positive law and equity,

The wisdom of legislators in framing positive laws to answer all the purposes of justice has ever been found unequal to the subject; and therefore, in all countries, those to whom the administration of the laws has been entrusted, have been compel-'led to have recourse to natural principles, to assist them in the interpretation and application of positive law, and to supply its defects; and this resort to natural principles has been termed judging according to equity. Hence a distinction has arisen in jurisprudence between positive law and equity; but the administration of both has in most countries been left, at least in their superior courts to the same In prescribing forms of proceeding in courts of justice human foresight has also been defective; and therefore it has been commonly submitted to the discretion of the courts themselves, to vary or add to established forms, as occasion and the appearance of new cases have required.

and of the discretion to vary or add forms.

Advantages and disadvantages of the system of the common law courts.

In England a policy somewhat different has prevailed. The courts established for the ordinary administration of justice, usually styled courts of common law, have, as in other countries, recourse to principles of equity in the interpretation and appli-

cation of the positive law: but they are bound to establish forms of proceeding; are in some degree limited in the objects of their jurisdiction; have been embarrassed by a rigid adherence to rules of decision, originally framed, and in general retained, for wise purposes, yet, in their application, sometimes incompatible with the principles of natural and universal justice, or not equal to the full application of those principles; and the modes of proceeding in those courts, though admirably calculated for the ordinary purposes of justice, are not in all cases adapted to the full investigation and decision of all the intricate and complicated subjects of litigation, which are the result of increase of commerce, of riches, and of luxury, and the consequent variety in the necessities, the ingenuity, and the craft of mankind. Their simplicity, clearness and precision, are highly advantageous in the ordinary administration of justice; and to alter them materially would probably produce infinite mischief; but some change would have been unavoidable if the courts of common law had been the only courts of judicature.

Early therefore in the history of our jurispru-dence the administration of justice by the ordinary diction of courts of equity. courts appears to have been incomplete, and to supply the defect the courts of equity have exerted their jurisdiction: assuming the power of enforcing the principles upon which the ordinary courts also decide, when the powers of those courts, or their modes of proceeding, are insufficient for the purpose; of preventing those principles, when enforced by the ordinary courts, from becoming (con-

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trary to the purpose of their original establishment) instruments of injustice; and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, and the positive law, as in the case of trusts, is silent (b). The courts of equity also adminis-[5] ter to the ends of justice, by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute pending a litigation; by preserving property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests; by restraining the assertion of doubtful rights in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a bound to vexatious and oppressive litigation, and preventing unnecessary multiplicity of suits: and, without pronouncing any judgment on the subject, by compelling a discovery, or procuring evidence, which may enable other courts to give their judgment; and by preserving testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation (c).

> (b) Principles of decision thus adopfully established and made the considered by those courts as rules de edict. præt. lib. 1, c. 6, p. 129. to be observed with as much strict-

^{152.} Pluraque quæ usu fori comproted by the courts of equity, when bata, denique juris scripti auctoritatem propter vetustatem obtinuerunt. grounds of successive decisions, are Cic. de invent. lib. 2, c. 22. Hienecc.

⁽c) It is not a very easy task acness as positive law. See the judg- curately to describe the jurisdiction ment of Sir Joseph Jekyll, quoted by of our courts of equity(1). This Sir Thomas Clarke, in Blackst. Rep. general description, though imper-

⁽¹⁾ As to the nature of equity jurisprudence and the extent of equity jurisdiction, see Smith's Manual of Equity, Introd. sect. I.

This establishment, as before observed, has obtained throughout the system of our judicial polity; most of the branches of that system having their peculiar courts of equity (d), and the court of chancery assuming a general jurisdiction, which extends to cases not within the bounds or beyond the powers of other jurisdictions (e).

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The existence of this extraordinary jurisdiction, Advantage of the separate administration of equientirely distinct from the ordinary courts, though ist. frequently considered as an enormity requiring redress, has perhaps produced a purity in the administration of justice which could not have been effected by other means; and it is in truth, in a causes of it.

is offered only for the purpose of elucidating the following treatise, in the course of which the subject must be in many points more fully considered.

- (d) Thus the court of exchequer, established for the particular purpose of enforcing the payment of debts due to the king, and incidentally administering justice to the debtors and accountants to the Crown, has its own peculiar court of equity(1). The courts of Wales, of the Counties Palatine(2), of London, of the Cinque Ports, and other particular jurisdictions, have also their peculiar courts of equity.
- (e) The court of equity in the exchequer chamber is also frequently considered as a court of general jurisdiction, and in effect it is so, in a great degree, though in principle it

fect, and in some respects inaccurate, is not. For its jurisdiction is in strictness confined to suits of the crown, and of debtors and accountants to the crown; and a suggestion, the truth of which the court will not permit to be disputed, "that its suitor "is a debtor and accountant to the "crown," is still used to give it more extensive jurisdiction. This practice, as well as a similar fiction used to give general jurisdiction to the common law court in the exchequer, and the fiction used to give jurisdiction to the court of king's bench in a variety of civil suits of which it has not strictly cognizance, may appear the objects of censure; but they have probably had the effect of preventing that abuse of power which is too often the consequence of the single jurisdiction of one supreme court.

⁽¹⁾ By the stat. 5 Vict. c. 5, s. 1, the equitable jurisdiction of the court of exchequer is transferred to the court of chancery.

⁽²⁾ The courts of the county palatine of Chester and the Principality of Wales have been abolished by the stat. 11 Geo. IV. and 1 Will, IV. c. 70, s. 14.

great degree, a consequence of that jealous anxiety with which the principles and forms established by the common law have been preserved in the ordinary courts as the bulwarks of freedom, and of the absolute necessity of preventing the strict adherence to those principles and forms from becoming intolerable.

Commencement of a suit by bill.

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A suit to the extraordinary jurisdiction of the court of chancery, on behalf of a subject merely, is commenced by preferring a bill, in the nature of a petition (f), to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal (g); or to the king himself in his court of chancery, in case the person holding the seal is a party (h), or the seal is in the king's hands (i). But if the suit is instituted on behalf of the Crown (k), or of those who partake of its prerogative (l), or whose rights are under its particular protection, as the objects of a public charity (m), the matter of complaint is offered to the court by way of information, given by the proper officer and not by way of petition (n). Except in some instances (o),

Commencement of suit by information.

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- (f) 9 Edw. IV. 41; Prac. Reg. p. 57, Wyatt's edit. This book, and other books of practice, are only cited where no other authority occurred, or where they might lead the reader to further information on the subject. The Practical Register is mentioned by Lord Hardwicke, 2 Atk. 22, as a book, though not of authority, yet better collected than most of the kind.
- (g) As to the authority of a lord keeper, see 5 Eliz. c. 18; and as to that of lords commissioners, see 1 W. & M. c. 21.
- (h) 4 Vin. Ab. 385; L. Leg. Jud. in Ch. 44, 255, 258; Jud. Auth. M.

- R. 182; 2 Prax. Alm. Cur. Canc. 463; Ld. Chan. Jefferies against Witherly.
 - (i) 1 West. Symb. Cha. 194, b.
- (k) 1 Roll. Ab. 373; Att. Gen. v. Vernon, 1 Vern. 277, 370.
- (l) As to idiots and lunatics, see chap. 1, sect. 1.
- (m) 1 C. in Cha. 158; Anon. 3 Atk. 276. See 1 Swanst. 292.
- (n) On the subject of informations, see Chap. 1, sect. 3.
- (a) There are some bills in early time in the French language. See Calendars of Proceed in Chan printed under authority of Commiss. on Public Records, 1827.

bills and informations have been always in the En- A suit by bill or information, glish language; and a suit preferred in this man-called a suit by English bill. ner in the court of chancery has been therefore commonly termed a suit by English bill, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court as a court of common law, which, till the statute of the 4 Geo. II. c. 26, were entered and enrolled, more anciently in the French or Norman tongue, and afterwards in the Latin, in the same manner as the pleadings in the other courts of common law.

Every bill must have for its object one or more Objects for of the grounds upon which the jurisdiction of the filed: court is founded; and as that jurisdiction sometimes extends to decide on the subject, and in some cases is only ancillary to the decision of another court, or a future suit, the bill may either complain relief, of some injury which the person exhibiting it suffers, and pray relief according to the injury; or, without praying relief, may seek a discovery of matter necessary to support or defend another suit; injunction. (1) or, although no actual injury is suffered, it may complain of a threatened wrong, and stating a probable ground of possible injury, may pray the assistance of the court to enable the plaintiff, or person exhibiting the bill, to defend himself against the injury whenever it shall be attempted to be committed. As the court of chancery has general

which bills are

⁽¹⁾ It is not allowab'e in effect to unite in one bill, a bill for relief, Bill for relief and a bill for discovery on a matter which is quite distinct from that distinct from relief, although both be connected with the same circumstances. So each other. that in a bill for a receiver, pending a litigation as to probate, a plaintiff cannot have a discovery in reference to the merits on that litigation. Wood v. Hitchings, 3 Beav. 504.

[9] jurisdiction in matters of equity not within the bounds or beyond the powers of inferior jurisdictons Writ of certio (p), it assumes a control over those jurisdictions, by removing from them suits which they are incompetent to determine. To effect this, it requires the party injured to institute a suit in the court of chancery, the sole object of which is the removal of the former suit by means of a writ called a writ of certiorari; and the prayer of the bill used for this purpose is confined to that object.

Answer on oath.

tiorari, generally requires the answer of the defen-Objects thereof. dant, or party complained of, upon oath. answer is thus required, in the case of a bill seeking the decree of the court on the subject of the complaint, with a view to obtain an admission of the case made by the bill, either in aid of proof, or to supply the want of it; a discovery of the points in the plaintiff's case controverted by the defendant, and of the grounds on which they are controverted; and a discovery of the case on which the defendant relies, and of the manner in which he means to support it. If the bill seeks only the assistance of the court to protect the plaintiff against a future injury, the answer of the defendant upon oath may be required to obtain an admission of the plaintiff's title, and a discovery of the claims of the defendant and of the grounds on which those claims are intended to be supported. When the sole object of a bill is a discovery of matter necessary to support or defend another suit, the oath of the defendant,

The bill, except it merely prays the writ of cer-

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⁽p) The court of equity in the exchequer chamber, though a particular, is not an inferior, jurisdiction.

is required to compel that discovery. The plain- Answer without tiff may, if he thinks proper, dispense with this ceremony, by consenting to or obtaining an order of the court for the purpose; and this is frequently done for the convenience of parties where a discovery on oath happens not to be necessary (1).

(1) In some of the States, as New-York and Massachusetts, provisions by statute and rule of court exist authorizing a waiver of answer on oath. 2 R. S. N. Y. 175, § 44. 24 Pick. Rep. (Mass.) rule 411. The statute has introduced a new principle in pleading. But the waiver must be of the whole bill. Complainant cannot, after answer on oath, amend his bill and introduce as one of his amendments such waiver. Defendant having answered the original, cannot be deprived of the benefit under oath, of answering the amendments. In such case the complainant, to obtain the benefit of a waiver, should dismiss his bill and commence anew. Burras v. Looker, 4 Paige Rep. 227. No special order of court is here required, but the waiver is stated in the bill, and then the answer, if under oath, has no more weight as evidence than the bill. The waiver may be safely resorted to where complainant has ample testimony to sustain his case, independently of the effect of defendant's oath, unless by such a disclosure of his case he defeats the equitable jurisdiction which he invokes. Thus on a bill for discovery and relief, in Massachusetts, where an assignee of an insolvent filed the bill to set aside a mortgage given by the insolvent debtor, as a preference and in contravention of the statute law in that state, and the bill waived all claim for discovery and answer on oath, the plaintiff asking no aid of defendant by way of discovery, but depending on proofs in his own power, it was held, that the same proofs that would support the bill would sustain a real action; and the plaintiff having a plain, adequate and complete remedy at law, the court held that it had no jurisdiction and dismissed the bill. Thayer v. Smith, 9 Metcalf Rep. 469.

But it is an important provision for a complainant, who has no confidence in the veracity of a defendant, and has but one witness to establish his case. For it is a rule in equity, that a party is not to be charged upon any fact stated in the bill against his own denial, in his answer under oath, of the existence of such fact, if the proof of the fact is only by one witness; upon the equitable principle that if he is put on his oath by his adversary, credit shall be given to his own declaration, unless it is contradicted by at least two witnesses, or by written documents. But then the answer must be direct, positive and unequivocal. Farnam v. Brooks, 9 Pick. Rep. 249, and cases cited.

And where the defendant is entitled to privilege of

The rule as laid down in Gould et al. v. Gould et al., 3. Story's Rep. 540.516, is, that an answer responsive is positive evidence for defendant, and to be taken as true, unless disproved by two credible witnesses, or by one credible witness, and facts entirely equivalent to, and as corroborative as another witness.

The general rule, it seems, requires complainant to produce "not only as much, but as much again evidence to establish his allegation, as if he had not made a witness of the defendant." Per Tracy, senator, in the court of errors, New-York, on reversal upon appeal from chancery, in Jackson et al. v. Hart, 11 Wend. Rep. 354. But in Clark's Ex'rs v. Van Riemsdyk, 9 Cranch Rep. 153-164; 3 Cond. Rep. 350-1. 346. See also, 2 Cond. Rep. 293, n. Green v. Tanner, 8 Metcalf Rep. 422. Where the weight of an answer on oath, or how far answers are evidence, and what are the effects of an answer on the allegations in the bill, and what countervailing testimony is required, had been fully discussed, it was held, that an answer, though positive in assertion, may be outweighed by circumstances, especially of a fact which in the nature of things could not be personally known by defendant. The general rule is admitted by the court, that two witnesses or one with "probable circumstances," must be produced to outweigh an answer asserting a fact responsive to the bill. The reason on which the rule stands is-the plaintiff calls on defendant to answer, admits it to be evidence. "If testimony, it is equal to that of one witness; and as plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness to turn the balance. But there may be evidence from circumstances stronger than that of a single witness." The weight of the answer must also from the nature of evidence, depend in some degree on the fact stated. If defendant assert a fact which cannot be within his own knowledge, the nature of the testimony cannot be changed by the positiveness of his assertion. Ibid.

In Green v. Tanner, 8 Metcalf Rep. 422. 411, the answer was held to be evidence for defendants, as to facts within their own knowledge, and to be taken as true, unless contradicted by two witnesses, or one "with probable and corroborative circumstances." So in Chance v. Teeple, 3 Green Ch. Rep. 173, it was held that the principle, that two witnesses are necessary to overcome answer on oath, (as laid down in Neville v. Demeritt, 1 Id. 335. 321,) is not universally true. One with corroborative circumstances is enough.

The answer is entitled to the full weight of the testimony of one credible and unimpeached witness, because the complainant by voluntarily appealing to the defendant's oath, makes him a competent witness for him, the complainant, against himself the defendant, and by

peerage, or as a lord of parliament, or is a corporation aggregate, the answer, in the first case, is

calling him is precluded from impeaching his testimony. But it has such weight, so far only as it is "responsive to the call in the bill for discovery, or connected necessarily with the responsive matter, or explanatory of it." So held in *Methodist Church* v. *Wood*, 5 Ohio Rep. 175, 174; condensed from 5 Hammond; in which new matter in answer to a bill of discovery, not so responsive, could not be read on trial, or used in evidence by the party. *Ib*.

So to the like effect only is the answer to bills for relief; new matter or statement of facts not inquired of in the bill, or allegations not responsive are not evidence of such facts, and will be disregarded by the court unless proved by defendant. (See New Eng. Bank v. Lewis, 8 Pick. Rep. 113. Neville v. Demeritt, 1 Green Ch. Rep. 335. Dickey v. Allen, Idem. 42, 43. 40. Brown v. Cutler, 8 Ohio Rep. 143.)

The answer must also be positive and unequivocal, (9 Pick. 249, ante,) direct and specific, (19 Pick. Rep. 234, post,) and its denial involve a fact which in its nature may be within defendant's knowledge, (9 Cranch Rep. 153, et seq. ante,) and in a matter necessary for his defence, (11 Wend. Rep. 354, ante.)

Although where the bill charged specific acts of fraud, the defendant, to have the full benefit of his answer, so far as to require more than one witness to control it, it must be direct and specific, as to the matter charged; yet where the answer denies fraud generally, the charges are not to be taken as true, and the defendant estopped to disprove them; but the plaintiff should except to his answer for insufficiency. Parkman v. Welch et al., 19 Pick. Rep. 234, 231.

In Massachusetts where plaint off may waive answer on oath, and then it has no more force as evidence than the bill; and where availing himself of that rule, she so framed her bill as to deprive the defendant of the usual privilege of answering under oath, and the hearing came up on the proofs, the court held that the burden rests entirely upon the plaintiff; and as she deprived the defendant of some of the means of defence usual in suits in chancery, it would seem but reasonable that she should be required strictly to sustain it. Babcock v. Smith et al., 22 Pick. Rep. 66. 61. In that case a new question, naturally growing out of the practice under the above rule was made; the depositions of two of the defendants were taken and offered in evidence. They contended that, according to the principles and practice in chancery, they were entitled to the benefit of their statements under oath, and that if the plaintiff may shut out their sworn answers, still they should have the benefit of them in the form of testimony. But whether the depositions of defendants may be admitted in any case, and if so under what circumstances they may be received, were quesrequired upon the honor of the defendant (q), and in the latter, under the common seal (r) (1).

(q) Ord. in Cha. Ed. Bea. 105,
261; 18 Ves. 470; 1 Ves. 470; 1
Ves. & B. 187; 1 Jac. & W. 526.
And see Robinson v. Lord Rokeby,
8 Ves. 601, as to Irish peers.

(r) It may be observed, that although in ordinary cases the answer is required upon oath, other sanctions are in certain instances allowed in practice: a Quaker puts in his answer upon his solemn affirmation and declaration, see 7 W. & M. c. 34; 8 Geo. I. c. 6. Ord in Cha. Ed. Bea. 247; Wood v. Story, 1 P. Wms. 781; Marsh v. Robinson, 2 Anstr.

479; and so it appears does a Moravian, see 22 Geo. II. c. 30. And infidels are permitted to swear according to the forms of the religion which they profess, provided such forms constitute an appeal to the Supreme Being; see the well known cases of Omychund v. Barker, 1 Atk. 21; S. C. 2 Eq. Ca. Abr. 397, and Ramkissenseat v. Barker, 1 Atk. 51; a Jew makes oath upon the pentateuch, Robeley v. Langston, 2 Keble, 314; Anon. 1 Vern. 263; and a Mahometan upon the Koran, Stra. 1104.

tions which the court waived, not having had time to consider, and not deeming the testimony offered essential to the decision. *Ibid.*

Although answer on oath be waived, yet defendant may put it in on oath. As where he wishes to move to dissolve an injunction on bill and answer denying the equity of the bill, the answer must be sworn to. Dougrey v. Topping, 4 Paige Rep. 95. 94. And whether the bill is sworn to by one or more complainants, the answer is entitled to the same credit as the bill, and when it denies the whole equity, the injunction will be dissolved, unless the allegations in the bill be sustained by the affidavit of a credible and disinterested witness, as required in New York by the 37 rule of the late court of chancery. Manchester v. Day, 6 Paige Rep. 296, 295.

See further as to weight and effect of sworn answer as between immediate parties or co-defendants, post, and next note (1).

(1) It is a principle of equity, that the plaintiff shall have a full discovery of material facts under the sanction of an oath of the party interested; and as a corporation answer under seal, he may adopt the course of an examination of a corporator as a party. This, as it obviates any cross-examination, whereby he might do away with his answer as a witness, is obviously much more beneficial than an examination of him as a witness. Therefore, on a bill for discovery and relief, any members of a corporation, whether officers, or simply corporators, and although it is not alleged that they have information more than any other corporator, may, so far as relates to discovery, be made party defendants and compelled to answer. Wright v. Dame et al., 1 Metcalf Rep. (Mass.) 237. 239. See as to proper form of prayer in the bill against a corporation and its officers, 1 Edw. V. C. R. 47 n.

To the bill thus preferred, unless the sole object Defence or disof it is to remove a cause from an inferior court of sary.

[It is a usual practice to make such of the individual members of a corporation parties as are supposed to know any thing of the matters inquired after in the bill. This is allowed by statute and sanctioned. by cases. 2 R. S. New-York, 464, § 43; Ib. 465, § 52; Anonymous, 1 Vern. 117; Brumley v. Westchester Manuf. Co. 1 J. C. Rep. 366; Fulton Bank v. Sharon Canal Co. 1 Paige's C. R. 218; Dummer v. Corp. of Chippenham, 14 Ves. Jr. 245. Indeed, it has been said, a discovery cannot be compelled in a suit against a corporation, except through the medium of their agents and officers, by making them parties defendants. And where their is an injunction, it would be desirable that an officer or other person acquainted with the facts in the answer should swear to it; for the injunction cannot be dissolved upon the general answer of the corporation, where the seal alone is sworn to, Fulton Bank v. Sharon Canal Co., supra.]

When the officers are made defendants, for the purpose of discovery merely, no relief should be prayed against them. McIntyre v. Trustees of Union College and E. Nott, 6 Paige Rep. 242-3. 239. If the officers answering, are not the same who were in office at the time of the transaction inquired about, they ought to go not only to the records, books and files for information, but to the former officers if living, and ascertain, as near as may be the truth of the matters about which they are interrogated. Kittredge v. The Claremont Bank et al., 1 Woodbury & Minot Rep. 247, 244,

No decree can be founded on their answer, either as against them or the corporation, but they may be sworn as witnesses. But the information may be deemed of importance to the complainant in the progress of his cause, and he has a right to the discovery. The object in making the agent a party, is for discovery to enable complainant to understand his rights, and direct his inquiries by amendment of his bill, or examination of witness. The corporation, therefore, may answer in the usual way, and the agent by separate answer. Vermilyea v. Fulton Bank, 1 Paige Rep. 37, 38. Wright v. Dame et al., 1 Metcalf, 237. 239, et seq.

In Haight v. The Proprietors of the Morris Aqueduct, 4 Wash. C. C. Rep. 601, Judge Washington decided that the answer of a corporation under seal, was sufficient to prevent the granting, or if granted, for the dissolution of injunction; and intimated that it would avail the corporation as evidence at hearing-same as if by individual on oath. The contrary was decided in The Fulton Bank v. The New-York and Sharon Canal Co. 1 Paige Rep. 111. So in The Union Bank of Georgetown v. Geary, 5 Peters' Rep. 111, the court by Thompson, J.,

equity, it is necessary for the person complained of either to make defence, or to disclaim all right to the matters in question by the bill(1). As the

says: "Although the reason of the rule which requires two witnesses or circumstances to corroborate the testimony of one, to outweigh the answer, may be founded in a great measure upon the consideration that the complainant makes the answer evidence, by calling for it, yet this is in reference to the ordinary practice of the court requiring the answer on oath. But the weight of such answer is very much lessened, if not actually destroyed, as a matter of evidence, when unaccompanied by an oath. And indeed, we are inclined to adopt it as a general rule, that an answer not under oath, is to be considered merely as a denial of the allegations in the bill, analogous to the general issue at law, so as to put complainant to the proof of such allegations." In the more recent case of Lovett v. The Steam Saw Mill Assoc. 6 Paige Rep. 59. 54, the chancellor, after quoting the above cases, and the opinion of the United States Court by Justice Thompson, says: " This is undoubtedly the correct view of the matter. The answer of a corporation without oath, where complainant does not require it to be sworn to, or supported by the sworn answers of the officers of the corporation, cannot be said to answer the double purpose of a pleading to put the material matters of the bill in issue, and of an examination of the defendant for the purpose of obtaining his evidence in support of the complainant's allegations: and it is for the latter purpose alone, that the complainant makes a witness of his adversary in the cause."

Serving a copy of the bill under the 23d order of August, 1841.

(1) By the 23d order of August, 1841, "where no account, payment, conveyance, or other direct relief is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear to and answer the bill. But the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the bill, whether the same be an original, or amended, or supplemental bill, omitting the interrogating part thereof; and such bill, as against such party, shall not pray a subpæna to appear and answer. but shall pray that such party, upon being served with a copy of the bill, may be bound by all the proceedings in the cause. But this order is not to prevent the plaintiff from requiring a party against whom no account, payment, conveyance, or other direct relief is sought, to appear to and answer the bill, or from prosecuting the suit against such party in the ordinary way, if he shall think fit." And by the 29th order "where no account, payment, conveyance or other relief is sought against a party, but the plaintiff shall require such party to appear to and answer the bill, the costs occasioned by the plaintiff having required such party so to appear and answer the bill, and the costs of

bill calls upon the defendant to answer the several charges contained in it, he must do so, unless he Exemption from unswering. can dispute the right of the plaintiff to compel such an answer, either from some impropriety in requiring the discovery sought by the bill, or from some objection to the proceeding to which the discovery is proposed to be assistant; or unless by disclaiming all right to the matters in question by the bill he shows a further answer from him to be unnecessary (s).

A defendant to a bill may have an interest to Formal answers. support the plaintiff's case, or his interest may not be adverse to that claim; he may be a mere trustee, or brought before the court in some character necessary to substantiate the suit, that there may

(8) In some cases a defendant may tion. See Chap. II. sect. 2, part 1, be compelled to answer, though he p. 105. has no interest in the matters in ques-

all proceedings consequential thereon, shall be paid by the plaintiff, unless the court shall otherwise direct."

According to the decision in Lloyd v. Lloyd, in a creditor's suit for administering the estate of a testator who has devised his real estate, subject to a power of sale for the payment of such part of his debts as his personal estate might be insufficient to pay, the devisees may be served with a copy of the bill under the 23d order. 1 Y. & C. Ch. C. 181.

But according to the decision in Barkley v. Lord Reay, where a suit is instituted for the raising of a legacy by a sale or mortgage of entailed real estate against the trustees thereof, who have the legal fee and full power to sell or mortgage and give receipts, it is not sufficient to serve the equitable tenant in tail with a copy of the bill. 2 Hare, 306.

The 23d order does not apply to the Attorney General. Christopher v. Cleghorn, 8 Beav. 314. As to other persons not within this order, see Marke v. Turner, 7 Jur. 1102.

The prayer that a party who is not required to appear and answer may be bound by all the proceedings in the cause, ought to be inserted in that part of the bill in which process is prayed against the other defendants. Gibson v. Haynes, 6 Jur. 203, L. C.

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be proper parties to it(1). In such cases, his answer may often be mere matter of form (2), submitting the subject of the suit to the judgment of the court; and, if any act should be required to be done by him, desiring only to be indemnified by the decree of the court.

The grounds on which defence may be made

to a bill either by answer, or by disputing the right

Grounds of de-

of the plaintiff to compel the answer which the bill requires, are various. The subject of the suit may not be within the jurisdiction of a court of equity: or some other court of equity may have the proper jurisdiction: the plaintiff may not be entitled to sue by reason of some personal disability: if he has no such disability he may not be the person he pretends to be: he may have no interest in the subject: or if he has an interest, he may have no right to call upon the defendant concerning it: the defendant may not be the person he is alleged to be by the bill: or he may not have that interest in the subject which can make him liable to the claims of the plaintiff: and finally, if the matter is such as a court of equity ought to interfere in, and no other court of equity has the proper jurisdiction, if the plaintiff is under no personal disability, if he is the person he pretends to

be, and has a claim of interest in the subject, and a right to call upon the defendant concerning it: if the defendant is the person he is alleged to be, and also claims an interest in the subject which may make him liable to the demands of the plain-

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^{(1) [}Bailey v. Inglee, 2 Paige Rep. 278.]

⁽²⁾ See ante p. 11, n. (1).

tiff; still the plaintiff may not be entitled, in the whole or in part, to the relief or assistance he prays: or if he is so entitled, the defendant may also have rights in the subject which may require the attention of the court, and call for its interference to adjust the rights of all parties; the effeeting complete justice, and finally determining, as far as possible, all questions concerning the subject, being the constant aim of courts of equity. Some of these grounds may extend only to entitle the defendant to dispute the plaintiff's claim to the relief prayed by the bill, and may not be sufficient to protect him from making the discovery sought by it; and where there is no ground for disputing the right of the plaintiff to the relief prayed, or if no relief is prayed, yet if there is any impropriety in requiring the discovery sought by the bill, or if the discovery can answer no purpose, the impropriety or immateriality of the discovery may protect the defendant from making it.

The defence which may be made on these seve- Defence founded on matter in ral grounds may be founded on matter apparent on a defect thereinthe bill, or on a defect either in its frame or in the case made by it; and may on the foundation of the bill itself demand the judgment of the court whether the defendant shall be compelled to make any answer to the bill, and consequently whether the suit shall proceed; or it may be founded on matter not apparent on the bill, but stated in the defence, and not on the face of the bill. may on the matter so offered demand the judgment of the court, whether the defendant shall be compelled to make any other answer to the bill, and consequently whether the suit shall proceed, except to try the truth of the matter so offered; or it may

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be founded on matter in the bill, or on further matter offered, or on both, and submit to the judgment of the court on the whole case made on both sides; and it may be more complex, and apply several defences differently founded to distinct parts of the bill.

Demurrer.

15 Plea.

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Answer.

Disclaimer.

Proceedings on a demurrer.

The form of making defence varies according to the foundation on which it is made, and the extent in which it submits to the judgment of the court. If it rests on the bill, and on the foundation of matter there apparent demands the judgment of the court whether the suit shall proceed at all, it is termed a demurrer; if on the foundation of new matter offered, it demands the judgment of the court whether the defendant shall be compelled to answer further, it assumes a different form, and is termed a plea; if it submits to answer generally the charges in the bill, demanding the judgment of the court on the whole case made on both sides. it is offered in a shape still different, and is simply called an answer. If the defendant disclaims all interest in the matters in question by the bill, his answer to the complaint made is again varied in Several forms of form, and is termed a disclaimer. And all these defence to several forms of defence, and disclaimer, or any of bill. them, may be used together, if applying to separate and distinct parts of the bill.

A demurrer, being founded on the bill itself, necessarily admits the truth of the facts contained in the bill, or in the part of the bill to which it extends; and therefore, as no fact can be in question between the parties, the court may immediately proceed to pronounce its definitive judgment on the demurrer, which if favourable to the defendant, puts an end to

so much of the suit as the demurrer extends to. A demurrer (1), if allowed, consequently prevents any Proceedings on further proceeding (t). A plea is also intended to plea. prevent further proceeding at large, by resting on some point founded on matter stated in the plea; and as it rests on that point merely, it admits, for the purposes of the plea, the truth of the facts contained in the bill, so far as they are not controverted by facts stated in the plea. Upon the sufficiency of this defence the court will also give immediate judgment, supposing the facts stated in it to be true; but the judgment, if favourable to the defendant, is not definitive; for the truth of the plea may be denied by the plaintiff by a replication, and the parties may then proceed to examine witnesses, the one to prove and the other to disprove the facts stated in the plea. The replication in this case concludes the pleadings (u); though if the truth of the plea shall not be supported, further proceedings may be had, which will be noticed in a subsequent page (x). An answer generally controverts the Proceedings on answer. facts stated in the bill, or some of them, and states other facts to show the rights of the defendant in

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(u) See Chap. III. [p. 321].

⁽t) An amendment of a bill has moved by amendment, to make a been permitted by a court of equity special order, adapted to the circumafter a demurrer to the whole bill had stances of the case. See Chap. II. been allowed; but this seems not to sect. 2, part 1. [p. 106]. have been strictly regular; 2 P. Wms. 300 (2); and it seems most proper, if (x) See Chap. II. sect. 2, part 2. the ground of demurrer may be re- [p. 218].

⁽¹⁾ That is, a demurrer to the whole bill. If a partial demurrer is allowed, the bill is still in court. And on allowing a demurrer for want of parties, the court generally gives leave to amend the bill. See A Headlam's Daniell's Ch. Pr. 552-555.

^{(2) [}See note to this case in Cox's edition of P. Wms.]

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New defence.

the subject of the suit; but sometimes it admits the truth of the case made by the bill, and, either with or without stating additional facts, submits the question arising upon the case thus made to the judgment of the court. If an answer admits the facts stated in the bill, or such as are material to the plaintiff's case, and states no new facts, or such only as the plaintiff is willing to admit, no further pleading is necessary; the answer is considered as true, and the court will decide upon it. But if the answer does not admit all the facts in the bill material to the plaintiff's case, or states any fact which the plaintiff is not disposed to admit, the truth of the answer, or of any part of it, may be denied, and the sufficiency of the bill to ground the plaintiff's title to the relief he prays may be asserted, by a replication, which in this case also concludes the pleadings according to the present (y) practice of the court. If a demurrer or plea is overruled upon argument the defendant must make a new defence (1). This he cannot do by a second demurrer of the same extent after one demurrer has been overruled; for although by a standing order of the court a cause of demurrer must be set forth in the pleading, yet if that is overruled any other cause appearing on the bill may be offered on argument of the demurrer, and, if valid, will be allowed; the rule of the court affecting only the costs. But after a demurrer has been overruled a new defence may be made by a demurrer less extended,

(y) See Chap. III. [p. 321.]

^{(1) [}See Goodrich v. Pendleton, 4 Johns. Ch. Rep. 551; Murray v. Coster, 4 Cow. Rep. 617; Townsend v. Townsend, 2 Paige Rep. 413.]

or by plea, or answer; and after a plea has been overuled, defence may be made by demurrer, by a new plea, or by an answer: and the proceedings upon the new defence will be the same as if it had been originally made (z). A disclaimer, neither Proceedings in asserting any fact, or denying any right sought by claimer. the bill, admits of no further pleading (a). If the Proceedings on a bill of discovering the proceedings of sole object of a suit is to obtain a discovery, there ry ora certioracan be no proceeding beyond an answer by which the discovery is obtained. A suit which only seeks to remove a cause from an inferior court of equity does not require any defence, and consequently there can be no pleading beyond the bill.

Suits thus instituted are sometimes imperfect in their frame, or become so by accident before their end has been obtained; and the interests in the property in litigation may be changed pending the suit Suits that are not in various ways. To supply the defects arising original suits. from any such circumstances, new suits may become necessary, to add to, or continue, or obtain the benefit of, the original suit. A litigation commenced by one party sometimes renders a litigation by another party necessary, to operate as a defence, or to obtain a full decision on the rights of all par-Where the court has given judgment on a suit, it will in some cases permit that judgment to be controverted, suspended, or avoided by a second suit; and sometimes a second suit becomes necessary to carry into execution a judgment of the court. Suits instituted for any of these purposes are also commenced by bill; and hence arises a variety of

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⁽z) See Chap. II. sect. 2, part 1. (a) See Chap. II. sect. 2, part 3. [106]. [306].

distinctions of the kinds of bills necessary to answer the several purposes of instituting an original suit, of adding to, continuing, or obtaining, the benefit of a suit thus instituted, of instituting a cross-suit, and of impugning the judgment of the court on a suit brought to a decision, or of carrying a judgment into execution; and on all the different kinds of bills there may be the same pleadings, as on a bill used for instituting an original suit.

19 Amendment of pleadings,

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It frequently happens that, pending a suit, the parties discover some error or defect in some of the pleadings; and if this can be rectified by amendment of the pleading, the court will in many cases permit it. This indulgence is most extensive in the case of bills; which being often framed upon an inacurate state of the case, it was formerly the practice to supply their deficiences, and avoid the consequences of errors, by special replications. But this tending to long and intricate pleading, the special replication requiring a rejoinder, in which the defendant might in like manner supply defects in his answer, and to which the plaintiff might surrejoin, the special replication is now disused for this purpose, and the court will, in general, permit a plaintiff to rectify any error, or supply any defect in his bill, either by amendment, or by a supplemental bill; and will also permit in some cases, a defendant to rectify an error or supply a defect in his answer, either by amendment, or by a further answer.(1)

⁽¹⁾ Dupote v. Massey, Coxe's Dig. 147. The reason why the practice of special replications, and the accumulation of specialties upon

Summary jurisdiction has been given by autho-Summary jurisdiction on petirity of parliament to courts of equity in certain cases arising incidentally from the provisions of acts of parliament, both public and private, without requiring the ordinary proceeding by bill or information and substituting a simple petition to the court; the assistance of the court being required only to provide for the due execution of the provisions of such acts.

But by an act of the 52 of Geo. III. c. 101, a in the case of charities. summary jurisdiction, on petition only, has been given in the case of abuses of trusts created for charitable purposes, which were the subjects of information by the king's attorney-general, to which the persons of whom complaint was made might make defence, according to the nature of the case stated in the information, by demurrer, plea or answer, so that the court might have before it the whole case on which its judgment might be required, and to which evidence to be produced in support of or in answer to the complaint made might be properly applied.

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them, is not allowed in equity, may be this: the great object of special pleading at common law is to keep the law and fact distinct, they being to be tried by separate tribunals; but, in equity, the whole question comes before the court for its decision both on the pleadings and the proofs. Lube, 371.

Special replications, however, may be filed by leave of court on cause shown, but not otherwise: by the practice of some of the States, as in New York and Massachusetts, (24 Pick. 413, Rule 14.) In the United States courts, the act regulating processes therein, having in reference to proceedings in equity, been generally understood to adopt the principles, rules and usages of the court of chancery of England, ante, p. 1, n. (1), complainants cannot make a new case by their replication, but should amend their bill. (Vattier v. Hinde, 7 Peters, 274.)

The loose mode of proceeding authorized by this act was probably intended to save expense in investigating abuses of charities: but in practice it unavoidably led to great inconvenience; the court not having before it any distinct record to which its judgment might be properly applied, and especially with respect to those against whom complaint might be made, or those against whom no such complaint could be made, but whose interests might be effected by the judgment of the court. inconvenience became apparent in a case which was made the subject of appeal to the House of Lords, who finally determined, that a jurisdiction, so summary, and in which the proceedings were so loose, ought, in just construction of the act, to be confined to the simple case of abuse of a clear trust, not involving any question beyond the question of such abuse, and particularly not involving the interests of persons to whom such abuse of trust Order in which could not be imputed (b) (1).

pleadings are considered.

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In an inquiry into the nature of the several pleadings thus used, it seems most convenient to consider them in the order in which they have their effect, and consequently to treat, 1, of bills; 2, of the defence to bills, and therein of demurrers, pleas, answers and disclaimers; 3, of replications; and 4, to notice matters incidental to pleadings in general, and particularly the cases in which amendments of inaccurate or erroneous pleadings are permitted.

(b) Corp. of Ludlow v. Greenhouse, D. Proc. Feb. 1827.

⁽¹⁾ On this subject, see 2 Headlam's Daniell's Ch. Pr. 1713, et seq.

CHAPTER THE FIRST.

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OF BILLS.

SECTION I.

By whom; and against whom, a Bill may be exhibited.

In treating of bills, it will be proper to consider, Order in which bills are treated I. The several persons who are capable of exhi-of. biting a bill, by themselves, or under the protection, or in the name of others; and against whom a bill may be exhibited: II. The several kinds and distinctions of bills: and III. The frame and end of the several kinds of bills. An information differing from a bill in a little more than in name and form, its nature will be principally considered under the general head of bills, and its peculiarities will be afterwards noticed.

It has been already observed that suits on behalf the attorney or of the crown and of those who partake of its prero-rai. gative or claim its peculiar protection, are instituted by officers to whom that duty is attributed (a). These are, in the case of the crown, and of those whose rights are objects of its particular attention,

(a) See above, p. 7.

the king's attorney (b) or solicitor-general (c); and [22] as these officers act merely officially, the bill they exhibit is by way, not of petition or complaint, but of information to the court of the rights which the

another person.

crown claims on behalf of itself or others, and of the invasion or detention of those rights for which the atthe relation of suit is instituted. If the suit does not immediately concern the rights of the crown, its officers depend on the relation of some person, whose name is inserted in the information, and who is termed the relator; and as the suit is carried on under his direction, he is considered as answerable to the court and to the parties for the propriety of the suit and Information and the conduct of it (d). It sometimes happens that this person has an interest in the matter in dispute, [23] of the injury to which interest he has a right to complain. In this case his personal complaint being joined to, and incorporated with, the informa-

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- (b) See 1 Swanst. 290, 291, 294, and Rex v. Austen, 8 Pri. Exch. R. 142. And the crown may be represented as plaintiff by the attorneygeneral, and as defendant by the solicitor-general, in the same suit, where there are conflicting claims between the king and persons partaking of hisprerogative, or under his peculiar protection. See Att. Gen. v. Mayor of Bristol, 3 Madd. 319; S. C. 2 Jac. & W. 294; Att. Gen. v. Vivian, 1 Russ. R. 226.
- (c) See, as to the solicitor-general, Wilkes's Case, 4 Burr. 2527; Sol. Gen. v. Dory, 6 May, 1735, and Sol. Gen. v. Warden and Fellowship of Sutton Coldfield, Mich. 1763, in larly considered in part iii. sect. 4, of see 1 Sim. & Stu. 396. a manuscript treatise on the Star-

- chamber, in the British Museum Harl. MSS. vol. i. No. 1226, mentioned in 4 Bl. Com. 267.
- (d) 1 Russ. R. 236. It appears, as intimated in the text, that it is not absolutely necessary, even in the instances there alluded to, that a relator should be named, 2 Swanst. 520; 4 Dow. P. C. 8, although the practice of naming one seems to have been universally adopted, 1 Ves. J. 247; 4 Dow. P. C. 8; 1 Sim. & Stu. 396, But it may be remarked that the legislature, in certain special cases in which the right may be doubtful, has empowered the attorney-general to institute a suit, by information, without requiring that a relator should be Chancery. This subject is particu- 'named. See 59 Geo. III. c. 91, and

tion given to the court by the officer of the crown, they form together an information and bill, and are without a remitted to the state of the state so termed (e) (1). But if the suit immediately tor. concerns the rights of the crown, the information is generally exhibited without a relator (f); and where a relator has been named, it has been done through the tenderness of the officers of the crown towards the defendant, that the court might award costs against the relator, if the suit should appear to have been improperly instituted, or in any stage of it improperly conducted (g). The queen-consort, partaking of the prerogative of the crown, [24] may also inform by her attorney (h).

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Suits on behalf of bodies politic and corporate,

(e) See as instances, Att. Gen. v. Oglender, 1 Ves. J. 247: Att. Gen. v. Brown, 1 Swanst. 265; Att. Gen. v. Master and Fell. of Cath. Hall, 1 Jac. R. 381; Att. Gen. v. Heelis, 2 Sim. & Stu. 67, and Att. Gen. v. Vivian, 1 Russ. R. 226. If the relator should not be entitled to the equitable relief which he seeks for himself, the suit may nevertheless be supported on behalf of the crown, 1 Swanst. 305; and upon an information and bill, the bill alone may be dismissed, see Att. Gen. v. Vivian, 1 Russ. R. 226. And see Att. Gen. v. Moses, 2 Madd. 294, a case of information and bill, in which the king having had no interest, the attorney-general was an unnecessary party.

lator for this purpose, and the oppresion arising from a contrary practice were particularly noticed by Baron Perrot, in a cause in the exchequer-

P. C. 136, Toml. Ed.

277, 370; Att. Gen. v. Crofts, 4 Bro-

(g) The propriety of naming a re-

Att. Gen. v. Fox. In that cause no relator was named: and though the defendants finally prevailed, they were put to an expense almost equal to the value of the property in dispute. See 2 Swanst. 520; 1 Sim. & Stu. 397; 1 Russ. R. 236. If the relator should die, this court would appoint another. Att. Gen. v. Powel, Dick.

(h) 10 Edw. III. 179; Collins, 131; 2 Røl. Ab. 213.

bill where the plaintiffs have

⁽f) Att. Gen. v. Vernon, 1 Vern.

⁽¹⁾ An information and bill is improper, where the persons named Information and as plaintiffs as well as relators have no individual interest; as where an information and bill is filed by three of the court of assistants of a no individual incompany in respect of a charity, and by two of the objects of the charity. Attorney Gen. v. E ist India Company, 11 Sim. 380.

sue by them-selves alone.

Persons who can and of persons who do not partake of the prerogative of the crown, and have no claim to its particular protection, are instituted by themselves, either alone or under the protection of others (1). Bodies politic and corporate (i), and all persons of full age, not being feme-covert, idiot or lunatic, may by themselves alone exhibit a bill. A feme-covert, if her husband is banished (k) or has abjured the realm (l), may do so likewise; for she then may act in all respects as a feme-sole (m). Those, therefore, who are incapable of exhibiting a bill by themselves alone, are, 1, infants; 2, married women, except the wife of an exile, or of one who has abjured the realm; 3, idiots and lunatics (n) (2).

Persons who cannot sue by alone.

> (i) 3 Swanst. 138. As examples of suits by such bodies, see the Charitable Corporation v. Sutton, 2 Atk. 406; Universities of Oxford and Cambridge v. Richardson, 6 Ves. 689; Mayor, &cof London v. Levy, 8 Ves. 398; City of London v. Mitford, 14 Ves. 41; Bank of England v. Lunn, 15 Ves. 569; Mayor of Colchester v. Lawton, 1 Ves. & B. 226; Dean and Chapter of Christ church v. Simonds, 2 Meriv. 467; East India Comp. v. Keighley, 4 Madd. 10; Vauxhall Bridge Company v. Earl Spencer, 1 Jac. R. 64; President, &c., of Magdalen College v. Sibthorp, 1 Russ. R. 154.

(k) 1 Hen. IV. 1; Sybell Belknap's

- case, 2 Hen. IV. 7, a; 11 Hen. IV. l. a. b.
- (l) Thomas of Weyland's case, 19 Edw. I.; 1 Inst. 133, a.
- (m) See Newsome v. Bowyer, 3 P. Wms. 37.
- (n) It may seem, that the disabilities arising from outlawry, excommunication, conviction of popish recusancy, attainder, and alienage, and those which formerly arose from villenage and profession, ought to be here noticed. Such of them as subsist do not, and the others did not, absolutely disable the person suffering under them from exhibiting a bill-Outlawry, excommunication (3) and conviction of pepish recusancy (4)

⁽¹⁾ A corporation can only sue in the name and style given to it. Porter v. Neckervis, 4 Randolph's (Virginia) Rep. 359. As to suits by foreign state, see [31] n. 2, post.

⁽²⁾ See p. [30,] n. (1).

⁽³⁾ This disability is removed by the statute 53 Geo. III. c. 127, s 3.

⁽⁴⁾ This disability is removed by the statute 31 Geo. III. c. 32.

1. An infant is incapable by himself of exhibiting a bill, as well on account of his supposed want sue by their next of discretion, as his inability to bind himself, and to make himself liable to the costs of the suit (0). When, therefore, an infant claims a right, or suffers an injury, on account of which it is necessary to resort to the extraordinary jurisdiction of the court of chancery, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights or to vindicate his wrongs; and the person who institutes a suit on behalf of an infant is therefore termed his But as it frequently happens that next friend (1). the nearest relation of the infant himself withholds the right, or does the injury, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the court, in favor of infants, will permit any person to institute suits on their behalf (p) (2); and whoever acts

[26]

are not in some cases any disability; and where they are a disability, if it is removed by reversal of the outlawry, by purchase of letters of absolution in the case of excommunication, or by conformity in the case of a popish recusant, a bill exhibited under the disability may be proceeded upon. Attainder and alienage no otherwise disable a person to sue than as they deprive

him of the property which may be the object of the suit. Villenage and profession were in the same predicament. See Chap. II. sect. 2, part 2.

(o) Turner v. Turner, Stran. 708. [Bradwell v. Weeks, 1 Johns. C. R. 3251.

(p) Andrews v. Cradock, Prec. in Chan. 376; Anon. 1 Atk. 570; 2 P. Wms. 120; 1 Ves. Jr. 195.

⁽¹⁾ The first we hear of a prochein amy is in the statute of Westminster, 2 C. 15. Infants' Lawyer. In matters relating to infants, the court often gives extra-judicial directions, and hears a person as amicus curia. Dict. per cur., in Earl of Pomfret v. Lord Windham, 2 Ves. 484. The filing of a bill on behalf of an infant makes him a ward of court. Ambl. 303. Lord Raymond's case, Forr. 60.

⁽²⁾ Where a bill is filed by an annuitant, whose annuity is charged Misjoinder of on residuary personal estate, and by infants who are the devisees of plaintiffs.

thus the part which the nearest relation ought to take, is also styled the next friend of the infant, and This responsibilities as such is named in the bill (q). The next friend is liable to the costs of the suit (r), and to the censure of the court, if the suit is wantonly or impro-

(q) 2 Eq. Cas. Abr. 239; 1 Ves. Jr. 195 [J. J. Marshall's Rep. 49.]

(r) 4 Madd. 461; and see Turner v. Turner, 2 P. Wms. 297, S. C. on appeal, 2 Eq. Ca. Ab. 238; and Strange, 708. It is hence, of course, important to the defendant that the prochein amy, or next friend of the infant, be a person of substance. Anon. 1 Atk. 507; and where the

contrary appears to be the fact, on an application by the defendant before answer, he will be compelled to give security for costs, or another person will be appointed to sue in his stead. Wale v. Salter. Mosely, 47; Anon. Mosely, 86; Anon. 1 Ves. Jr. 409; and see Pennington v. Alvin, 1 Sim. & Stu. 264 (1).

leaseholds, by the annuitant as their next friend, seeking payment of the annuity and the renewal of the leases for the infants; this is a misjoinder; for in this case one plaintiff seeks relief in which the other is not interested. Besides, if the annuitant were to die, the suit would abate, though as to that portion of it which she instituted as next friend, it would not abate but for the misjoinder. Again, supposing the court to decide the one portion of the suit in favor of the annuitant, and the other branch of it against the infants, they could procure no redress in case the annuitant, as their next friend, refused to take any further steps; or if the reverse were to take place, the infants might be delayed in the redress awarded to them by an appeal interposed by the annuitant on his own behalf. Anderson v. Wallis, 4 Y. & C. Eq. Ex. 336; 1 Phil. 202.

(1) As to this point, see 1 Headlam's Daniell's Ch. Pr. 80, contra.

[In New York, the next friend must be a competent and responsible person; and if required by the officer appointing him, must give bond with sureties to account to infant for moneys that may be recovered in the suit. See R. S. 446, 52. 5. Id. 144.

Perhaps, in a proper case, on an application to the court, an infant who had no means to indemnify a responsible person for costs, might be permitted to sue by his next friend in forma pauperis. Fulton v. Rosetelt, 1 Paige's C. R. 180. Chancellor Walworth, in saying this, adds, "I see no objection to such a proceeding, though Lord El-"don intimated it could not be done. But in such a case the court " would, in the first place, see that there was probable cause for the "proceeding, and appoint a proper person to prosecute the suit as "prochein amy." And see the case in 1 Ves. Jr. 409.]

perly instituted (s): but if the infant attains twentyone, and afterwards thinks proper to proceed in the cause, he is liable to the whole costs (t) (1). the person who thus acts as a friend of an infant does not lay his case properly before the court, by Collusion. neglector mistake collusion, neglect or mistake, a new bill may be by him. brought on behalf of the infant; and if a defect Defect in the bill. appears on hearing of the cause, the court may order it to stand over, with liberty to amend the bill (u).

28

The next friend of an infant plaintiff is consi-Exemination of a next friend. dered as so far interested in the event of the suit

(s) An if the next friend of an infant do not proceed in the cause, this court, if it be desirable, will supersede him. Ward v. Ward, 3 Meriv. 706; 1 Jac. & W. 483; but the next friend of an infant cannot procure the substitution of another person to act in his place, without submitting to an investigation into his past conduct by the court, Melling v. Melling, 4 Madd. 261. If the next friend should die, the court will take upon itself to appoint another. Luncaster v. Thornton, Ambl. 398. [1 Dick. 346, S. C.] Bracey v. Sandiford, 3 Madd. 468. [See mode of applying, ibid: and 1 Grant's Prac. 341.]

(t) Turner and Turner, 2 P. Wms. 297, Lord King was first of opinion

that, upon a bill filed in the name of an infant who attained twenty-one, the plaintiff was liable to the costs, though he did not proceed after he attained that age : but upon a rehearing he changed his opinion, and dismissed the bill without costs, the prochein amy being dead. See S. C. Strange, 708, and 2 Eq. Ca. Ab. 238. It now seems, that if no misconduct (Pearce v. Pearce, 9 Ves. 548;) be proved against the next friend, either in the institution or progress of the suit, the late infant, although he should not adopt it, will be liable to the costs, Anon, 4 Madd. 461.

(u) Serle v. St. Eloy, 1 P. Wms. 386. Pritchard v. Quinchant, Ambl.

⁽¹⁾ The only exception to this rule must be, the case that sometimes occurs, where a decree has been made during his infancy, by which the infant's rights are bound. There the suit cannot be abandoned, although it is not brought in good faith and is against the interest of the infant. In such a case, if the infant applies in time, the court might compel the next friend to remunerate him for the costs and expenses to which his estate has been improperly subjected, although he was compelled to proceed under the decree. Waring v. Crane, 2 Paige's C. R. 82.

29

Suit not for the infant's benefit.

that he or his wife (x) cannot be examined as a witness (1). If their examination is necessary for the purposes of justice, his name must be struck out of the bill, and that of another responsible person substituted, which the court, upon application, will permit to be done (y). As some check upon the general license to institute a suit on behalf of an infant, if it is represented to the court that a suit preferred in his name is not for his benefit, an inquiry into the fact will be directed to be made by one of the masters; and if he reports that the suit is not for the benefit of the infant, the court will Two suits in the stay the proceedings (z). And if two suits for the same purpose are instituted in the name of an infant, by different persons acting as his next friend, the court will direct an inquiry to be made in the same manner, which suit is most for his benefit;

infant's name.

(x) Head v. Head, 3 Atk. 511.

(y) Strange, 708. As a general rule, it may be stated that this is done upon the next friend giving security for the costs incurred in his time. Witts v. Campbell, 12 Ves. 493; Davenport v. Davenport, 1 Sim. & Stu. 101.

(z) Da Costa v. Da Costa, 3 P. Wms. 140; Strange, 709; 2 Eq. Ca. Ab. 239; [Garr v. Drake, 2 Johns. Ch. Rep. 542.] Such an inquiry will not be directed upon the application of the next friend himself. Jones v. Powell, 2 Meriy. 141.

⁽¹⁾ This disability would seem to be removed by the statute 6 & 7 Vict. c. 85.

[[]In a case at law, Denniston v. Spurling, 1 Stra, 506, where an infant brought the action, the wife of the next friend was called, and the court allowed her to be a good witness; while in Head v. Head, referred to, above, in the notes, the depositions of the wife of a next friend were not allowed to be read for the plaintiff, he being liable for costs. Lord Redesdale's rule is no doubt correct. It is confirmed by the common practice of applying for substitution, where the present next friend is wanted as a witness; as in Witts v. Campbell; Davenport v. Davenport, supra.]

and when that point is ascertained will stay proceeding in the other suit (a).

2. A married woman being under the protection 2. Married woof her husband, a suit respecting her rights is jointly with their husbands, or by their next friend.

But it somes their next friend. usually instituted by them jointly (b). But it some-

Dick. 310 (1); Sullivan v. Sullivan, the suits. 1 Jac. R. 528. 2 Meriv. 40; Mortimer v. West, 1 cation for this purpose should not be made except in a strong case, Stevens v. Stevens, 6 Madd. 97; nor

(a) 1 Ves. 545; Owen v. Owen, generally, after a decree in one of

(b) Smith v. Myers, 3 Madd. 474; Swanst. 358; but it seems an appli- Farrer v. Wyatt, 5 Madd. 449; Hughes v. Evans, 1 Sim. & Stu. 185 (2).

(1) [This case of Owen v. Owen does not bear the author out in his saying that proceedings will be stayed. The court was pressed to restrain the plaintiff in the second suit from prosecuting that suit; but Sir Thomas Clark, M. R., refused to do so, as such proceeding would be at his peril; and on searching by order of his honor, precedents could not be found, the parties generally resting on the report. in Taylor v. Oldham, 1 Jacob's Rep. 527, the court rightly felt the difficulty of staying the second suit; for there might never be a decree in the first cause. Bennet, in his late work on the Duties of Masters, says, it will be referred to the master to see which is most for the infant's profit; and upon these references the master is at liberty to suggest any improvement in the frame of the suit, and to report any special circumstances that in his opinion may be for the infant's benefit, p. 45.

(2) [Schuyler v. Hoyle, 5 Johns. Ch. Rep. 196. As a general rule, no temporary absence of a husband or separate maintenance, or living apart, will enable a wife to sue or be sued, alone. But if he is an alien who has never resided within the jurisdiction, she can. Robinson v. Reynolds, 1 Aiken's (Vermont) Rep. 174.]

So in Massachusetts, it has been held, that the wife may sue as a feme sole, where the husband abandoned her abroad, or there compelled her to leave him, and she has come hither, and maintained herself as a feme sole. (15 Mass. Rep. 31. 6 Pick. Rep. 89.) these cases conflict, it seems, with recent English decisions. (See the cases cited, Story's Eq. Pl. c. 3, § 61, n. 1.)

In New York, by the Code of Procedure, the rule is now laid down generally, that "when a married woman is a party, her husband must be joined with her, except that, 1. When the action concerns her separate property, she may sue alone; 2. When the action is between herself and her husband, she may sue or be sued alone." (Code, § 94.)

times happens that a married woman claims some right in opposition to rights claimed by her husband; and then the husband being the person, or 30 one of the persons, to be complained of, the complaint cannot be made by him. In such case, therefore, as the wife being under the disability of coverture cannot sue alone, and yet cannot sue under the protection of her husband, she must seek other protection, and the bill must be exhibited in her name by her next friend (c), who is also named in the bill in the same manner as in the case of

> (c) Griffith v. Hood; 2 Ves. 452; of a feme covert is not always, in Lady Elibank v. Montolieu, 5 Ves. the first instance, liable to the costs. 737; Pennington v. Alvin, 1 Sim. Strange, 709; 2 Eq. Ca. Ab. 239; & Stu. 264.

Barlee v. Barlee, 1 Sim. & Stu. 100.

(d) But, it seems, the next friend

Her disqualification as well as privilege, as thus defined, extends to actions whether of legal or equitable nature; whereas formerly she might sue her husband in equity, but not at law. (See Story's Eq. Juris. § 1368. Story's Eq. Pl. § 61--3.)

an infant (d) (1). But a bill cannot in the case of

Suits respecting separate estate.

(1) Husband and wife ought not to join as plaintiffs in a suit relating to the wife's separate property, but the bill ought to be filed by the wife alone, by her next friend, and her husband ought to be made a defendant: first, because the husband may have filed the bill in his wife's name, without her knowledge or consent, and may by collusion with the other parties have the accounts improperly taken: and secondly, because the wife being, as to her separate estate, entitled to prosecute a suit by her own authority, independently of her husband, a suit by her and her husband, which is considered as the suit of the husband alone, would not prevent her from instituting another suit; so that the defendant might be annoyed by two suits instead of one. If the objection is taken by demurrer, the court will give leave to amend, by striking out the name of the husband as plaintiff, and as next friend of his infant children, where he is named as such, and making him a defendant, and by inserting the name of another person as next friend. Wake v. Parker, 1 Keen, 59; England v. Downs, 1 Beav. 96; Owden v. Campbell, 8 Sim. 551; Sigel v. Phelps, 7 Sim. 239; Thorp v. Yeates, 1 Y. & C. Ch. C. 438; Davis v. Prout, 7 Beav. 288.

In Bowers v. Smith, 10 Paige Rep. 201. 194, it was held also by

a feme-covert be filed without her consent (e).

(e) Andrews v. Cradock, Prec. in 1 Sim. & Stu. 265; [Fulton v. Rose-Ch. 376; S. C. 1 Eq. Cas. Abr. 72; velt, 1 Paige Ch. Rep. 178.]

the Chancellor, that a suit to settle any question as to the separate estate of a wife in personal property, bequeathed to her separate use, free from the control of her husband, is not properly, to be brought in their joint names. But that if defendant answer the bill without objection, he probably waives the objection that the husband is not the proper party to file the bill for wife's separate estate.

In Dyett and wife v. North Amer. Coal Co. 20 Wend. Rep. 570-5. On affirmance of S. C. 7 Paige Rep. 9, et seg., in relation to the effect of admissions as against her in a joint answer touching her separate estate, Justice Cowen, on whose opinion the court of errors unanimously affirmed the decision below, says: when her separate estate is completely distinct, and as here independent of her husband, she seems to be regarded in equity, as to her power to dispose or charge it, to all intents and purposes as a feme sole, excepting so far as her power is limited by the instrument under which she takes her interest. Hence she may sue or be sued by her husband, or become a substantial party against, or at suit of others. As to form of proceeding, she must sue by her prochein amy, or her husband may by her consent be joined with her against a third person. So he must be made party defendant when she is sued, but he is then merely a formal party. Admissions, however, in their joint and several answer bind her. See farther, Id.

[In a court of equity, although not at law, baron and feme are con- suits by wife sidered as two different persons; and, therefore, it is that a wife by her against her husprochein amy may sue her own husband. Sturgis v. Corp., 13 Ves. 190; 3 P. Wms. 38, note A; Kirk v. Clark, Prec. in Ch. 275.]

[In Tennessee, a bill has been allowed to be brought by a feme covert, for separate maintenance without a next friend, where security for costs was given. Knight v. Knight, 1 Overton's Rep. 120.]

In New Jersey, a wife may in her own name, apply for divorce for any cause. Amos v. Amos, 3 Green's Ch. Rep. 171. As to the rule in New York, under the new code, see n. (2), p. 29, supra.

By the Revised Statutes of the State of New York, Vol. ii. p. 144, § 39, a bill for a divorce dissolving the marriage contract, may be exhibited by a wife in her own name, as well as by her husband. A bill to annul a marriage on the ground that one of the parties was under the age of legal consent, may be brought by the parent or guardian entitled to the custody of such minor, or by the next friend of such minor, Ib. 142, § 21. If, on the ground of idiotcy or lunacy, any relative of such idiot interested to avoid the marriage may file a bill. Ib. \ 24, 25. The consent of an infant to a bill filed in his name is not necessary (f).

[29]
3. Idiots and lunatics,

3. The care and commitment of the custody of the persons and estates of idiots and lunatics are the prerogative of the crown, and are always intrusted to the person holding the great seal, by the

(f) Andrews v. Cradock, Prec. in Ch. 376; [2 Paige Ch. Rep. 178.]

And where the marriage of an idiot or lunatic is sought to be annulled during the life-time of both the parties to the marriage, and no suit shall be prosecuted by any relative, a bill may be filed on the application of any person admitted by the court to prosecute as the next friend of such idiot or lunatic. Ib. 143, δ 26. After a restoration of reason, the party who has returned to sanity may file such bill. Ib. δ 27. If on account of force or fraud, on the application of the wronged party-or of the parent or guardian of such party. Ib. δ 30. If on the ground of physical incapacity, by the injured party against the party whose incapacity is alleged, suits to annul a marriage are directed to be by bill. Ib. 144, δ 35. A separation from bed and board for ever, or for a limited time, may be decreed by the court of chancery on the complaint of a married woman. δ 50.

But no bill is to be filed in the name of a feme covert to obtain a sentence of nullity declaring void her marriage contract, or to obtain a decree for a separation or limited divorce, unless the suit is prosecuted. by a responsible person, as the next friend of the complainant, who is to be responsible to the defendant for such costs as may be awarded by the court, if it appear the suit was commenced without any reasonable or justifiable cause. Lawrence v. Lawrence, 3 Paige's Ch. Rep. 267; 163 Rule of N. Y. Chancery. The validity of this rule was tested and supported in Wood v. Wood, 2 Paige's Ch. Rep. 454; S. C. on appeal, 8 Wend. 357. It will be seen that this rule does not touch a case of adultery; there, a bill may be filed by the wife without a next friend; and see Kirby v. Kirby, 2 Paige's Ch. Rep. 261. See the history of the law of divorce in the State of New York, in Burtis v. Burtis, 1 Hopk. 557.] The New York statutes on divorce are original regulations, and do not adopt the English law, which is chiefly ecclesiastical. See Johnson v. Johnson, 14 Wend. in Err. 637. 648. Burtis v. Burtis, 1 Hopk. 557. [Where a married woman is a complainant and her prochein amy dies, she must name a new next friend in due time afterwards, or her bill will be dismissed. Vice-chancellor Leach. ordered it to be done within two months. Barlee v. Barl e, 1 S. & S. 100.]

royal sign-manual (1). By virtue of this authority, upon an inquisition finding any person an idiot or lunatic, grants of the custody of the person and estate of the idiot or lunatic are made to such persons as the lord chancellor, or lord keeper, or lords commissioners for the custody of the great seal for the time being, think proper (g). Idiots and luna- who sue by their committees or tics, therefore, sue by the committees of their es-by the a general. tates (h) (2). Sometimes, indeed, informations

(g) 3 P. Wms. 106, 107; Ex parte Pickard, 3 Ves. & Bea. 127.

(h) 1 Ca. in Ch. 19; Ridler v. Ridler, 1 Eq. Ca. Ab. 279; Prac. Reg. 272, Wy. Ed.

(1) By the statutes of the State of New York, the chancellor had (prior to the abolition of the court, and transfer of its powers to the law courts,) the exclusive care and custody of all idiots, lunatics, persons of unsound mind, and those who are incapable of conducting their own affairs in consequence of habitual drunkenness. 2 R. S. 52, § 1; L'Amoureax, committee, v. Crosby, 2 Paige's Ch. Rep. 422.] In some other States, as Massachusetts, guardians are appointed by courts of probate, with similar powers. See Story's Eq. Pl. § 64-6. 70, and notes.

(2) [The court of chancery has no jurisdiction in the matter of lunatics, unless they are found to be so under a commission of lunacy, or they are parties in the cause in court. In re Scott, 3 Legal Obs. 164.

In the consistorial court of London, a father, not being committee, instituted a suit to annul the marriage of an insane son, and the suit was dismissed. A suit was afterwards brought by the son who had become of age and sane, and it was sustained.

A bill of complaint may be taken off the files of the court, if filed in the name of a plaintiff who was in a state of mental incapacity. Wartnaby v. Wartnaby, 1 Jac. R. 377.

In the appointment of a committee, relations, unless there is some specific objections, are preferred to strangers. Ex parte Cockayne, 7 Ves. 591; Ex parte Le Heup, 18 Ib. 222; Matter of Livingston, 1 J. C. R. 436. The same person may be committee of the person and of the estate; and he may likewise be appointed guardian in a suit-Ex parte Broomfield, 3 B. C. C. 510; Ex parte Ludlow, 2 P. W. 635; Westcomb v. Same, Dick. 233. The committee ought to be resident within the jurisdiction of the court; and if he goes out of it, he ought not to be continued in the character of committee. In such a case, it is his duty to give up his office. Ex parte Ord. 1 Jacob's R. 94.

have been exhibited by the attorney-general on behalf both of idiots and lunatics, considering them as under the peculiar protection of the crown (i),

(i) Att. Gen. v. Parkhurst, 1 Ca. 1 Ca. in Ch. 153; 3 Bro. P. C. 633. in Ch. 112; Att. Gen. v. Woolrich, Toml. Ed.

Committees must give security, and be also otherwise proper and responsible persons so as to be sufficient to bear costs, &c. In re Frank, 2 Russ. Rep. 450; 2 Eden. supra. And, in the State of New York, additional security may be required for the faithful application and accounting for the proceeds arising from a sale, lease or mortgage. 2 R. S. 54, § 14.

Where no one can be procured to act as committee of the estate, or where the committee resides at a considerable distance from the estate, a receiver may be appointed, with a salary, upon giving such security as a committee does. Ex parte Warren, 10 Ves. 612; and see Ambl. 104.

A committee will sometimes be appointed without a reference, where the property is small. In re Adams, 1 Rus. & M. 112.

The committee can make himself a party to a petition, without a bill filed, and thereby obtain an order to restrain waste on the real estate of the lunatic. Matter of *Hallock*, 7 J. C. R. 24.

Where a committee of a lunatic sues for anything in the right of the lunatic, in such case the committee as well as the lunatic, are made parties. It is as needful to make the lunatic a party as an infant, where a suit is on his beltalf. But in the case of an idiot, it must be otherwise. Fuller v. Lance, 1 C. C. 18 n; Attorney General v. Woolrich, Ib. 153.

A lunatic is not a necessary party plaintiff with his committee on a bill to set aside an act done by the lunatic, under mental imbecility, and although it is the general practice to join them, it is only a matter of form. Ortley v. Messere, 7-J. C. R. 139.]

The general rule as to parties now established in New York by the Code of Procedure, (tit. 3, § 91, et seq.,) is, that every action must be prosecuted in the name of the real party in interest, excepting in certain specified cases. But the reason of the rule is to produce uniformity in the prosecution of legal or equitable demands; formerly, assignees of certain choses in action must have sued at law in name of assignor, not so now. (See the title of the code, supra.) It does not apply, it seems, to persons under mental disability, in whose names, the committee of their persons and estate, prosecute as usual, it is presumed, with or without joining the name of the individuals who are of non-sane understanding.

and particularly if the interests of the committee have clashed with those of the lunatic (k). in such cases, a proper relator ought to be named (l); and where a person found a lunatic has had no committee, such an information has been filed, and the court has proceeded to give directions for the. care of the property of the lunatic, and for proper proceedings to obtain the appointment of a committee (m).

32 [30]

Persons incapable of acting for themselves Other non-comthough not idiots or lunatics, or infants, have been permitted to sue by their next friend, without the intervention of the attorney-general (n) (1).

their next friend.

- (k) See Att. Gen. v. Panther, Dick. 748.
- (1) Att. Gen. at relation of Griffith Vaughan, a lunatic, against Tyler and others, 11 July, 1764. On motion, ordered that a proper relator should be appointed, who might be responsible to the defendants for the costs of the suit. See Dick. 378; 2 Eden. 230. And see Att. Gen. v. Plumptree, 5 Madd. 452, though the case of a charity information.
- (m) Att. Gen. on behalf of Maria Lepine, a lunatic, at the relation of John Fox; and also Maria Lepine against Earl and Countess Howe 26 March, 1793-3 and others. April 1794.
- (n) Eliz. Liney, a person deaf and dumb, by her next friend, against Thomas Witherly and others. In chancery-Decree, 1 Dec. 1760. Decree on supplemental bill, 4 March, 1779. See Wartnaby v. Wartnaby, 1 Jac. Rep. 377.

[In Malin v. Malin, 2 Johns. Ch. Rep. 238, one Jemima Wilkinson, who was a necessary party plaintiff, had religious scruples from becoming a party to any suit. Chancellor Kent said, "if Jemima W. " has religious scruples which cannot be surmounted, and this shall be

^{(1) [}Chancellor Thurlow has said, he was not against the practice of finding a man lunatic who was, by the infirmities of age, unequal to the management of his affairs. But the more usual course in the English court is to appoint him a guardian, or some person to act for him, in the receiving and managing his property. Cur. Can. 468; Wyatt's P. R. 272; Sackvill v. Ayleworth, 1 Vern. 105, and cases there; Attorney General v. Tyler, 2 Eden. 230; Highm. on Lun. 4. In the matter of Barker, 2 J. C. R. 232, a commission was issued against a party who, from age, had become incapacitated.]

Defendants

A bill may be exhibited against all bodies politic and corporate, and all persons, as well as infants, married women, idiots and lunatics, as those who are not under the same disability, excepting only the king and queen (o). But to a bill filed against a married woman her husband must also be a party, unless he is an exile, or has abjured the realm (1); and the committee of the estate of an idiot or lunatic must be made defendant with the person whose property is under his care (2). Where the

(o) See Chap. II. sect. 1, p. [102.]

-to a bill against a married woman, idiot, or lunatic.

[&]quot;made to appear, either by affidavit or the report of a master, perhaps she may be permitted to become plaintiff by he prochein amy. A person incompetent to protect himself from age or weakness of mind, or from some religious delusion or fanaticism, quem urget fanaticus error, rel inacunda Diana, ought to come under the protection of the court."]

^{(1) [}Pain v. ____, Cary, 92; Same book, 55; Clark v. Lord, Angier, 1 C. C. 41; Pierce v. Thornly, 2 Sim. 167. This is not invariably the case, for she may, possibly, claim in opposition to her husband. Wybourn v. Blount, 1 Dick. 155; Newsome v. Bowyer, 3 P. Wms. 38, note a; Perine v. Swaine, 1 J. C. R. 24; Ferguson v. Smith, 2 Ib. 139; and see Carey v. Whittingham, 1 S. & S. 163. Or, she may have been sued by her husband. Ex parte Strangeways, 3 Atk. 478. Perhaps they may be living separate. Barry v. Cane, 3 Mad. Rep. 472; and see Chambers v. Bull, 1 Anst. 269; Leithly v. Taylor, Dick. 372; Ib. 138. 143. 155; Plomer v. Plomer, 1 C. R. 68; Ormsby v. White, 1 Hogan's C. R. 254. Or she or he may be lunatic; or she may be deserted; or the husband may be necessarily abroad. 1 Grant's Pract. (2d edit.); Glover v. Young, Bunb. 167; Carter v. Carter, 1 Paige's Ch. Rep. 463; Bushell v. Bushell, 1 S. & S. 164. Or, she may be under age. 1 Vent. Rep. 185; Moore v. Greenville, Toth. 95. If a plea or demurrer is necessary, they must, in ordinary cases, both join. Pain v. ____, supra; Spicer v. Pakine, Cary, 39.]

^{(2) [}Sackvill v. Ayleworth, 1 Vern. 105; note 13, at p. 111 of 3 P-Wms. The soundness of the observation here made, as to joining the lunatic with his committee as a defendant, may well be doubted; see what Chancellor Kent says in The Executors of Brasher v. Van Cortlandt, 2 J. C. R. 242, and cases there referred to; but also see Harri-

rights of the crown are concerned, if they extend rights of the only to the superintendence of a public trust, as in cerned. the case already mentioned of charity, the king's attorney-general may be made a party to sustain those rights; and in other cases, where the crown is not in possession, a title vested in it is not impeached, and its rights are only incidently concerned, it has generally considered that the king's attorneygeneral may be a party in respect of those rights, [31] and the practice has been accordingly (p). But where the crown is in possession, or any title is. vested in it which the suit seeks to divest or affect,

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. (p) See Balch v. Wastall, 1 P. Wms. 445; Dolder v. Bank of England, 10 Ves. 352.

son v. Rowan, Coxe's Digest, pl. 229. A person in the condition of a lunatic or idiot has been allowed to answer by guardian. Westcomb v. Westcomb, Dick. 233; Gason v. Garnier, Ib. 286; and see Lee v. Ryder, Geld. & Mad. 292; Anonymous, cited in note B. 3 P. Wms. 111; Eyre v. Wake, 4 Ves. Jr. 795; Wilson v. Grace, 14 Ves. Jr. 171. Where the amount of property has been small, a guardian has been appointed. Ex parte Picard, 3 V. & B. 127. In Howlett v. Wilbraham, 5 Mad. 423, on motion of the complainant, a guardian was appointed to defend for a lunatic defendant.

If the committee happens to be a defendant in his own right, the complainant should proceed against the lunatic, (this, by the by, would seem to show the latter ought to be a party,) and if the committee refuses to answer for him, a new committee will be appointed. Lloyd v. _____, 2 Dick. 460. See a case where the committee was one of the complainants. Snell v. Hyatt, Dick. 287.

It is doubtful how far the insolvency of a committee will be a sufficient cause for removing him as a party. In one case it was done; but in a later case, it was not. See Ex parte Mildmay, 3 Ves. Jr. 2; Ex parte Proctor, 1 Swanst. C. R. 532; Ex parte Livingston, 1 J. C. R. 436.

Where, after a decree in a suit, in which a lunatic and his committee are defendants, and the committee dies and a new one is appointed; a motion should be made for an order that the latter be named as the committee in all the future proceedings in the cause. Lyon v. Mercer, 1 Sim. & S. 356.]

or its rights are the immediate and sole object of the suit, the application must be to the king by petition of right (q), upon which, however, the crown may refer it to the chancellor to do right, and may direct that the attorney-general shall be made a party to a suit for that purpose; or a suit may be instituted in the court of exchequer, as a court of revenue, and general auditor for the king, and relief there obtained, the attorney general being made a party (r) (1). The queen has also the same prerogative (s).

Suit affecting parties out of the jurisdiction. Aliens, &c.

A suit may affect the rights of persons out of the jurisdiction of the court, and consequently not compellable to appear in it (2). If they cannot be pre-

stated p. 18. Reeve against Att. Gen. mentioned in Penn against Lord Baltimore, 1 Ves. 445, 446. The bill was dismissed 27 Nov. 1741, by Lord Hardwicke.

(r) Lord Hardwicke, in Huggins and York-buildings Company, in

(q) See legal juric. in Chanc. chancery, 24 Oct. 1746; Pawlett v. Att. Gen. in Excheq. Hardres, 465; Poole v. Att. Gen. Excheq. Parker, 272; Wilkes's case, Exch. Lane, 54. (s) 2 Roll. Ab. 213. But see Staunf. Præer. 75-6. 9 Hen. VI. 53.

Writ of annuity against Joan queen dowager of Henry IV.

(1) See note (1) page 6.

Suit by a foreign sovereign.

⁽²⁾ A foreign sovereign may sue in equity. Hullett v. The King of Spain, 2 Bligh. 31, (N. S.); and in the courts of the United States, (Stery's Eq. Pl. § 55, n. 3. See also, Id. § 69, 69 a, 4th ed.) . But alien-sovereigns, and their representatives of the sovereignty of the respective nations abroad, are exempted from civil prosecutions. The law of nations sanctions their inviolability. By the constitution of the United States, (Art. 3, sec. 2,) the supreme court of the United States has original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a State is a party. The judicial power of the United States also extends to cone troversies to which the United States is a party, or between two or more states, between a state and citizen of another state; (but not to any suit commenced or prosecuted against one of the United States. by citizens of another state, or by citizens or subjects of any foreign state. Art 11 of Amendments,) between citizens of different states,

vailed upon to make defence to the bill, yet, if there are other parties, the court will in some cases proceed against those parties (t); and if the absent parties are merely passive objects of the judgment of the court, or their rights are incidental to those of parties before the court, a complete determination may be obtained (u); but if the absent parties are

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- (t) Williams v. Whinyates, 2 Br. C. C. 399; 1 Sch. & Lefr. 240; 16 Ves. 326.
- (u) In Att. Gen. at relation of University of Glasgow against Baliol College and others, in chancery Dec. 11th; 1744, which was an information filed, impeaching a decree made in 1699, on an information by . the attorney-general against the trustees of a testator, his heirs at law, and others, to establish a will, and a charity created by it, alleging Ca. Abr. 74.

that the decree was contrary to the will, and that the University of Glasgow had not been made party to the suit; Lord Hardwicke overruled the latter objection, as the university of Glasgow was a corporation out of the reach of the process of the court, which warranted the proceeding without making that body party to the suit. See Walley v. Whalley, 1 Vern: 487; Rogers v. Linton, Bunb. 200; Quintine v. Yard, 1 Eq.

between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects, in which cases the supreme court of United States has appellate jurisdiction, both as to law and facts, with such exceptions and under such regulations as congress shall make. Const. ib. art. 3, § 2.

In a suit against a sovereign prince, who is also a British subject, the Suit against a fobill ought, upon the face of it, to show that the subject matter of it reign sovereign. constitutes a case on which a sovereign prince is liable to be sued as a subject. The Duke of Brunswick v. The King of Hanover, 6 Beav. 1. (See this case as quoted in Story's Eq. Pl. § 69 a, 4th ed., and see

A foreign state may sue in equity. But it must sue in the names Suitby a foreign of some public officers who are entitled to represent its interests, and upon whom process can be served on the part of the defendants, and who can be called upon to answer the cross bill of the defendants. And, therefore, where a bill was filed by "the government of the state of Columbia, and Don-M. J. Hurtado, a citizen of that state, and minister plenipotentiary from the same," &c., a general demurrer to the whole bill was allowed. 'The Columbiam Government v. Rothschild, 1 Sim. 94.

government.

to be active in the performance of a decree, or if they have rights wholly distinct from those of the other parties, the court cannot proceed to a determination against them (x) (1).

(x) See Fell v. Brown, 2 Bro. C. an absolute defect of justice, which C.276; [Bifield v. Taylor, 1 Beatty, seems to require the interposition of 91.] Hence there semetimes arises the legislature.

(1) The doctrine of the text is, that a suit may affect the rights of persons out of the jurisdiction, and therefore not compellable to appear, who cannot be prevailed on to make defence, who are merely passive under the judgment, not active in the decree; or whose rights are not wholly distinct but incidental from those of the parties before the court: otherwise the court cannot proceed to a determination against them, and by consequence there is in England, sometimes a failure of justice that seems to require legislative interposition; note (x), ut sup.

The practice in England is, where there are necessary parties, to state in the bill that they are without the jurisdiction, and to pray process whenever they come within the jurisdiction. See post, 399. Smith v. Hibernian Mine Co. 1 Scho. & Lef. 240. 2 lb. 548. Edwards on Parties, 3, 4. They are thus made parties; [for none are parties as defendants, though named in the bill, against whom process is not prayed. Fawkes v. Pratt, 1 P. Wms. 593; Windsor v. Windsor, 2 Dick. 707; Coop. Eq. 16; Beames' Elem. Pleas, 148.] They have then a right to appear as such. But if they obstinately refuse, there may be, as suggested, a failure of justice-where their rights are primary in the suit, or not merely incidental. For the principle applies to all courts of equity, that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court. Mallow v. Hinde, 12 Wheat. 193; 6 Cond. Rep. 516, et seq. And the general rule founded on that principle, as to parties, (and which with its qualifications is treated in the sequel, p. 43. 190. 325. 397, et seq.,) requires that all, materially interested in the subject and object of the suit, must be brought in as parties. But the rule was made by the court to promote justice, and may be modified for the like purpose. Elmendorff v. Taylor, 10 Wheat. 152. It is one of convenience and discretion, and is held by the courts of the United States, as not universally applicable to cases in those courts. Ib. Accordingly the rule is bent to prevent as far as possible, a failure of justice. "It is the settled practice of those courts, that if the case can be decided on its merits, between those regularly before them, to decree as between them. The circumstance that others, not within their jurisdiction, may be collaterally or incidentally concerned, who

must have been made parties had they been amenable to its process, shall not expel other suitors who have a constitutional and legal right to submit their case to a court of the United States, provided the decree may be made without affecting those interests." The court, per Ch. J. Marshall, Vattier v. Hinde, 7 Peters, 263-4. 252. The court will require the plaintiff to do all in his power to bring in every person concerned in interest. But if the case may be completely decided as between the litigants, the circumstance of an interest in some one whom the process cannot reach, as if he be resident of another state, will not prevent a decree on merits. So where the right of the party before the court do not depend on that of the party not before the court. But even then, if practicable, they all should be brought in on the general principle to avoid multiplicity of suits, and have the whole matter settled. But where the complainants have no rights separable from and independent of the rights of persons not parties, or whose rights lie at the very foundation of the claim of right by the plaintiffs, and a final decree cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties, these must be brought in or the bill be dismissed; but the court, in laying down this doctrine, would still retain the cause, (which was an injunction bill,) where parties required it, as between the parties, until the plaintiffs have opportunity of litigating with the other parties in a competent tribunal, and if it finally appear they are equitably entitled to the interest claimed by the other parties, may proceed to a final decree on the merits. Mallow v. Hinde, 12 Wheat. 193; 6 Cond. Rep. 516-519, 520. So in an earlier case, where it was held that the incapacity of the circuit courts of the United States to proceed against any person residing within the United States, but not within the district for which the court may be holden, justifies them in dispensing with parties merely formal; and so where the real merits may be determined without essentially affecting the interests of absentees, it may be the duty of the court to decree as between the parties before them; but where absentees are essential parties to the merits of the question, and would be much affected by the decree, the court will not proceed to a final decision until they are made parties, even though some of them are not within the jurisdiction of the court. Nevertheless the court suggested that it was possible the essential parties-who were assignees of insolvents-might consent to make themselves parties, and the court would, instead of dismissing the bill brought to hearing for want of proper parties, give leave to make new parties. Russell v. Clark's Ex'rs., 7 Cranch, 69-97; 2 Cond. Rep. 426-7. See also Harrison v. Urann, 1 Story's Rep. 66. 64.

The extra-territorial effect of a judgment or decree in personam, against a non-resident, and not served with process, within the jurisdiction of the court, or who does not appear voluntarily, is regarded by

the state courts as inoperative out of the state, or purely local. By the lex loci rei sita, property of such person may be made subject to the jurisdiction, so as to render the judgment or decree binding, as a proceeding in rem; but it will not be allowed to operate in personam in the courts of any other state. The question has been decided the same way in nearly half the states of the union, and probably no courts of any state have held such a proceeding conclusive upon the rights of a party proceeded against, who has not appeared or otherwise submitted his rights to the decision of the court in which such proceedings were instituted. Bates v. Delavan, 5 Paige Ch. Rep. 305-6, and cases cited. But in New York and some other states, (24 Pick. 412, Rule 8 in Chancery,) provision by legislation and rule of court, authorising, in lieu of actual service of process on parties beyond its jurisdiction, publication or personal service of an order, to appear and answer, and in default, that the bill be taken as confessed, [and as so to unknown persons having an interest in the subject matter, see laws of New York, 1831, p. 243, rules 174, et seq. Hudson v. Twining, 1 Taml. 315; Ely v. Broughton, 2 Sim. & S. 188, obviates the difficulty of making them parties, and renders an omission so to do, less excusable than where for want of such legislation, the non-joinder of parties having rights, has been a source of grievance and fraud. [Lord Redesdale, Gifford v. Hort, 1 Sch. & Lef. 386.]

Where such provision prevails, the English rule, so far as charging the fact of defendants being beyond the jurisdiction, is not adopted. Otherwise the fact is stated, and then the court proceeds against the parties, and if the disposition of the property is in the power of the other party, the court may act upon it. Cruger v. Daniel et al., 1 McMullan Eq. C., S. Carolina, 190. 157.

CHAPTER I.

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SECTION II.

Of the several kinds and distinctions of Bills.

IT has been mentioned in the introduction that different kinds of bills are used to answer the several purposes of instituting an original suit, of adding to, continuing, or obtaining the benefit of a suit thus instituted, of instituting a cross-suit, of impugning the judgment of the court on a suit brought to a decision, and of carrying a judgment into exe-The several kinds of bills have been usually considered as capable of being arranged under three general heads: I. Original bills, which relate to some matter not before litigated in the court by the same persons standing in the same interests. II. Bills not original, which are either an addition to, or a continuance of, an original bill, or both. III. Bills, which, though occasioned by or seeking the benefit of a former bill, or of a decision made upon it, or attempting to obtain a reversal of a decision, are not considered as a continuance of the former bill, but in the nature of original bills. though this arrangement is not perhaps the most perfect, yet, as it is nearly just, and has been very generally adopted in argument, and in the books of reports and of practice, it will be convenient to treat of the different kinds of bills with reference to it.

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[34] I. Original bills.

I. A bill may pray relief against an injury suffered, or only seek the assistance of the court to enable the plaintiff to defend himself against a possible future injury, or to support or defend a suit in Those which pray relief, are, a court of ordinary jurisdiction. Original bills have therefore been again divided into bills praying relief, and bills not praying relief. An original bill praying relief may be, 1. A bill praying the decree or ordinary origiorder of the court touching some right claimed by the person exhibiting the bill, in opposition to some right claimed by the person against whom the bill bills of interpleatis exhibited. 2. A bill of interpleader, where the person exhibiting the bill claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons, for the safety of the persons exhibiting the bill (1).

nal bills,

der,

certiorari bills.

not pray relief are bills to per-petuate testimo-ny and bills of discovery.

3. A bill praying the writ of certiorari to remove a Those which do cause from an inferior court of equity. An original bill not praying relief may be, 1. A bill to perpetuate the testimony of witnesses. 2. A bill for discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings, or other things in his custody or power.

II. Bills not original. Such are

II. A suit imperfect in its frame, or become so by accident before its end has been obtained, may, in many cases, be rendered perfect by an new bill, which is not considered as an original bill, but merely as an addition to or continuance of the former bill, or both. A bill of this kind may be,

Supplemental

^{(1) [}Bedell v. Hoffman, 2 Paige's Rep. 199.]

1. A supplemental bill, which is merely an addition to the original. 2. A bill of revivor, which is a continuance of the original bill, when by death some bills of revivor, party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone. A bill both of revivor and supplement, which continues a suit upon an abatement, and supplies defects arisen from some event subsequent to the institution of the suit (1).

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3. bills of revivor and supplement.

III. Bills for the purposes of cross litigation of III. Bills in the matters already depending before the court, of con- are are troverting, suspending, avoiding or carrying into execution a judgment of the court, or of obtaining the benefit of a suit which the plaintiff is not entitled to add to or continue for the purpose of supplying any defects in it, have been generally considered under the head of bills in the nature of original bills, though occasioned by or seeking the benefit of former bills: and may be, 1. A cross-bill, exhibited cross bills. by the defendant in a former bill, against the plaintiff in the same bill, touching some matter in litigation in the first bill. A bill of review, to examine and bills of review, reverse a decree made upon a former bill, and signed by the person holding the great seal, and enrolled, whereby it has become a record of the court bills in the na-(2). 3. A bill in the nature of a bill of review, brought by a person not bound by the former decree. bill to impeach a decree upon the ground of fraud. 5. bills to suspend de-A bill to suspend the operation of a decree on special circumstances, or to avoid it on the ground of mat-

review, bills to impeach 4. A a decree for fraud, bills to suspend

^{(1) [}Westcott v. Cady, 5 Johns. Ch. Rep. 337.]

^{(2) [}Wiser v. Blachley and others, 2 Ib. 488.]

cution.

bills in the na-ture of bills of revivor.

bills in the nature of supple-mental bills.

bills to carry a ter arisen subsequent to it. 6. A bill to carry a decree made in a former suit into execution. bill in the nature of a bill of revivor, to obtain the benefit of a suit after abatement in certain cases which do not admit of a continuance of the original bill. 8. A bill in the nature of a supplemental bill, to obtain the benefit of a suit, either after abatement in other cases which do not admit of a continuance of the original bill, or after the suit is become defective, without abatement in cases which do not admit of a supplemental bill to supply that defect.

CHAPTER I.

SECTION III.

Of the frame and end of the several kinds of Bills and of Informations.

Three classes of The several kinds of bills have been already conbills. sidered as divided into three classes. In the first class have been ranked original bills; in the second, bills not original; in the third, bills in the nature of original bills, though occasioned by former bills. The frame and end of the several kinds of bills will be treated with reference to this distribution, and the peculiarities of informations will be considered under a fourth head.

I. Original bills have been mentioned as again I. Original bills. divisible into bills praying relief, and bills not praying relief.

Original bills praying relief have been ranked under three heads.—1. Original bills praying the decree of the court touching some right claimed by nal bills praying relief. the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited. 2. Bills of interpleader. And, 3. Certiorari bills.—Bills of the first kind are the bills most usually exhibited in the court; and as the several other kinds of bills are either consequences of this, or very similar to it in many respects, the consideration of bills of this kind will in a great measure involve the consideration of bills in general.

1. An original bill, praying the decree of the ginal bills. The bill must show the plaintiff's title to the biting the bill, in opposition to rights claimed by assistance of the court, the person against whom the bill is exhibited, must show the rights of the plaintiff, or person exhibiting the bill; by whom, and in what manner, he is injured; or in what he wants the assistance of the court; and that he is without remedy, except in a court of equity, or at least is properly relievable, or can be most effectually relieved there. Having thus shown the plaintiff's title to the assistance of the court, the bill may pray, that the defendant, or persons against whom the bill is exhibited, may answer upon oath (1), the matters charged against him; and it may also pray the relief or assistance and pray suitable of the court which the plaintiff's case entitles him to. For these purposes the bill must pray, that a writ, called a writ of subpoena, may issue under the preparation asub-

⁽¹⁾ Unless the answer on oath be waived, as it may be in England by special order, or consent, and in some of the United States, by legislative provision and general rules of courts. See p. 10, note.

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40 or a letter missive,

great seal, which is the seal of the court, to require the defendant's appearance, and answer to the bill. unless the defendant has privilege of peerage, or is a lord of parliament, or is made a defendant as an officer of the crown (1). In the case of a peer or peeress, or lord of parliament, the bill must first pray the letter of the person holding the great seal, called a letter missive, requesting the defendant to appear to and answer the bill (a); and the writ of subpæna only in default of compliance with that And if the attorney-general is made a request. defendant as an officer of the crown, the bill must pray, instead of the writ of subpæna (b), that he, being attended with a copy, may appear and put in an answer. It is usual to add to the prayer of the bill a general prayer of that relief which the circumstances of the case may require; that if the plaintiff mistakes the relief to which he is entitled, the court may yet afford him that relief to which he has a right (c), (2). Indeed it has been said, that

or that the defendant, in the case of the attorney-general, may appear and answer.

Prayer for general relief.

(a) This mark of courtesy is in respect of peerage generally, see Lord Milsington v. Earl of Portmore, 1 Ves. & B. 419; and is to be observed towards Scotch peers, see Act of Union with Scotland, 5 and 6 Anne, c. 8, art. 23, and Irish peers

not members of the House of Commons, see Act of Union with Ireland, 39 and 40 Geo. III. c. 67, art. 4, and Robinson v. Lord Rokeby, 8 Ves. 601.

(b) See Barclay v. Russell, Dick729; S. C. 3 Ves. 424.

(c) Hollis v. Carr, 2 Mod. 86.

Frame of prayer. Set off, (1) See note (1), p. 11.

⁽²⁾ Where a bill prays that an account may be taken of the dealings and transactions between the plaintiff and the defendant, who has brought an action against the plaintiff, and that the defendant may be decreed to pay to the plaintiff what shall appear to be due to him upon taking such account, the plaintiff being ready and willing to pay what, if any thing, shall appear to be due from him to the defendant, the court will not decree a set-off; because with such relief the relief prayed for is totally inconsistent; for in the case of a set-off, the defendant

a prayer of general relief, without a special prayer of the particular relief to which the plaintiff thinks himself entitled, is sufficient (d); and that the particular relief which the case requires may, at the hearing, be prayed at the bar (e). But this relief must be agreeable to the case made by the must be agreeable to the case made by the must be agreeable to the case bill (f) (1), and not different from it (g) (2); and made by the bill.

very inaccurate. See 1 Eden. R. Peters, 595.) 26; 11 Ves. 574. [See Johnson v. Johnson, 1 Munf. 549.]

Madd. 408.

(f) Beaumont v. Boultbee, 5 Ves. ford, 3 Ves. 402; Palk v. Lord Clin-485; Hiern v. Mill, 13 Ves. 114; 2 ton, 12 Ves. 48.

(d) See Cook v. Martyn, 2 Atk. 3. Sch. & Lefr. 10. 729; 3 Swanst. The report of this case is apparently 208, note. (English v. Foxall, 2

(g) 2 Atk. 141; 3 Atk. 132; 1 Ves. Jr. 426; 2 Ves. 299; Birch v. (e) See Wilkinson v. Beal, 4 Corbin, 9 Dec. 1784, in Chan., 1 Ves. Jr. 426; Lord Walpole v. Lord Or-

would not be ordered to pay the plaintiff the balance, but the balance would be directed to be applied in satisfaction of the damages, if any which the defendant would otherwise be entitled to receive. Rawson Samuel, Cr. & Phil. 161.

(1) The plaintiff may have such relief, under the prayer for general Relief under the relief, as the statement of his case entitles him to ask. Topham v. ray relief. Columbine, Taml. 135; Meller v. Minet, Ib. 487.

But after stating certain grounds for relief in the bill, he cannot have relief upon other grounds not pointed out in the bill; because that would be a surprise upon the defendant. And hence where an equitable mortgagee seeks relief against elegits on the ground of fraud, no relief can be given on the general ground, real or supposed, that an equitable mortgage has priority over a title by elegit under a judgment subsequent to the mortgage, where no case is made by the bill for relief on that ground; although, indeed, there is a charge that the plaintiff is entitled to priority in respect of the equitable mortgage over the elegits, and a prayer corresponding to such charge, but such charge does not clearly point out the general ground above mentioned as a ground for relief, distinct from that of fraud, so as to entitle the plaintiff at the hearing to ask relief upon that general ground. Whitworth v. Gaugain, Cr. & Phil. 325.

(2) The prayer may be for general, specific and alternative relief. Under the general prayer, particular relief may be had, but the relief is only as the case stated and proofs sustaining it justify. (Hobson v. M'Arthur, 16 Peters, 182. 195. English v. Foxall, 2 Id. 595.) The allegata and probata must meet, or agree with reasonable certain-

the court will not in all cases be so indulgent as to

ty. (See 45, note. Smith v. Axtell et al., Saxton's Ch. Rep. New Jersey, 497—8, et seq. 494.) But the same strictness of pleading and proof does not obtain in equity as at law, especially where defendant is not surprised. (See p. 45, note, infra: Hatcher v. Hatcher.)

So under the general prayer, though a prayer for specific relief be added, as is usual, yet relief inconsistant with the relief specially prayed, if consistent with the case and proofs may be granted, provided the defendant be not surprised or prejudiced. And so the constitutionality of legislative acts may be brought in question, and relief granted, under the general prayer, if the bill be properly framed for such purpose. (Smith v. The Trenton Delaware Falls Co., 3 Green's Ch. Rep. New Jersey, 510, 511, 505.). [Wilkin v. Wilkin, 1 J. C. Rep. 111. Cook v. Mancius, 5 lb. 89; Allen v. Coffman, 1 Bibb. 459; and see Sheppard's Ex'rs v. Starke, 3 Munf. 29; and note to 1 Munf. 554; Bailey v. Burton, 8 Wendell's Rep. 339.]

But when the general prayer and for further relief is in the conjunctive, for example: "that the assignment may be declared void, and complainants be paid out of the assigned property, and for further relief as the nature of the case requires." Any thing in addition to the specific relief prayed, consistent with it and warranted by the case made, may be decreed; but not any relief inconsistent with the specific relief prayed for can be had. To obtain other relief, which, though inconsistent with the specific relief prayed, would be justified by the equity of the case made, the prayer should be in the disjunctive, or, thus: " and that your orator may have such additional relief, or such other or further relief as the equity of the case may require, and this court may adjudge proper." [The leading case on this technical point was Colton v. Ross, 2 Paige's Ch. Rep. 396-8; sanctioned and followed by cases in 2 Edw. V. C. R. 201. 281. Dowdall v. Lenox, Pleasants v. Glasscock, 1 Smedes & Marshall's C. Rep. Mississippi, 24, 25. 18. Foster v. Cooke, 1 Hawk. Rep. 509.

[Where three kinds of relief are prayed for in the bill, and the complainant is entitled to one of them, the defendant cannot demur. Western Ins. Co. of Buffalo v. Eagle Fire Ins. Co., 1 Paige's C. Rep. 284.

It has been said, that the court will not grant relief which is without the scope of the complainant's bill, and not prayed for specifically. *Jarmon's case*, 3 Monroe's Rep. 119; S. P. Withers v. Thompson, Ib. 333. But this observation, it is presumed, proves nothing: for no relief can be granted beyond the scope of the bill, nor can the prayer go further than such scope.]

The same technical distinction, in the form of the prayer, is applied to the prayer for alternative relief. See next note.

permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced. If, therefore, the plaintiff Bill with a doudoubts his title to the relief he wishes to pray, the bill may be framed with a double aspect; that if the court determines against him in one view of the case, it may yet afford him assistance in another (h) (1). Upon an information by the attorney-ge-Prayer in an inneral on behalf of a charity, the court will give the

(h) 2 Atk. 325; and see Perry v. Phelips, 17 Ves. 173.

(1) Where a bill is filed against certain members of a club, for the Prayer for payrecovery of money belonging to the club, and it prays that the money court may dimay be paid to the plaintiff, "or otherwise as the court may direct;" rect." in such case, if it ought not to be paid to the plaintiff, the court will take care that it is paid to the persons who ought to have the management of it. Richardson v. Hastings, 7 Beav. 323.

If a bill prays relief contingently against one defendant, only in the Prayer for relief event of the court not giving relief against another defendant, it is demurrable. Seddon v. Connell, 10 Sim. 79.

If a bill by the directors of an insurance company prays that a policy Went of offer to may be delivered up to be cancelled, or that the company may other-miums. wise be relieved therefrom in such manner as the court may think fit; this is a submission to the judgment of the court as to the terms on which the relief is to be granted; and therefore it is not necessary that the plaintiffs should expressly offer to pay back the premiums received on the policy. Barker v. Walters, 8 Beav. 92.

Where a person conveys an estate, in trust, out of the rents, or by Want of offer to redeem prior in a sale or mortgage thereof, to pay a debt, and afterwards mortgages its cumbrance. and the mortgagee files a bill, praying an execution of the trusts of the prior deed, and payment of the prior debt in the first place, and then of the mortgage debt due to himself; the bill is demurrable for want of an offer to redeem the prior incumbrancer, or to pay him any deficiency there may be, in case the sum realized by the sale of the estate should be less than the prior debt. Care v. Foulks, 5 Law J. Ch. Rep. (N. S.) 206, M. R.

Where the bill is for specific execution of contract, providing only for valuation of land, not for sale or payment of money: if the facts justify prayer of any such relief, the bill should be framed with a double aspect. For we have seen (p. 41, note,) that under the general prayer, the court gives such relief only as the case stated and proofs sustaining it justify. (Hobson v. M'Arthur, 16 Peters, 182. 195.

But where vendor of goods recovered judgment against vendee, be-

proper directions as to the charity, without regarding the propriety or impropriety of the prayer of the information (i).

General rule as to parties. All persons interested in the subject of the suit ought generally to be parties (k) (1), if within the

(i) Att. Gen. v. Jeanes, 1 Atk. 355; 1 Ves. 43. 72. 418; Att. Gen. v. Breton, 2 Ves. 426, 427; 11 Ves. 247. 367; 2 Jac. & W. 370; and it seems that a similar observation would in some instances apply upon a bill filed on behalf of an infant, Stapilton v. Stapilton, 1 Atk. 2; and see Durant v. Durant, 1 Cox, 58, in which, on reference to the record, it appears that the daughter was an infant. Reg. Lib. 1783, p. 192.

(k) This proposition, although undoubtedly correct in relation to suits for relief, Pawlet v. Bishop of London, 2 Atk. 296; Poore v. Clarke, 2 Atk. 515; 1 Ves. Jr. 39; 7 Ves. 563; 1 Meriv. 262; 3 Meriv. 512, has been said, but upon somewhat doubtful authority, not to apply where discovery alone is sought. Sangosa v. E. I. Comp. 1 Eq. Ca. Ab. 170.

fore he has notice of a fraud in the purchase, and on return of execution unsatisfied, files a judgment creditor's bill under the law and practice of the State of New-York, he cannot therein pursue the goods or its proceeds in the hands of a third person, on ground that the sale was fraudulent and void. Nor is it the proper subject of a bill with a double aspect. Lloyd v. Brewster et al., 4 Paige's Rep. 540—1. 537.

A proper case for a bill with a double aspect is, where the complainant is in doubt whether he is entitled to one kind of relief or another, upon the facts of his case as stated in his bill. He may then frame his prayer in the alternative; so as if the court decide that one kind of relief is not proper, he may still be entitled to obtain any other relief to which he is entitled under the other part of the alternative prayer. (Ibid. See also, Colton v. Ross, 2 Id. 396—8; 1 Johns. Ch. Rep. 111; 14 Johns. Rep. 527; 1 Id. 529.) [Foster v. Cocke, 1 Hawks. Rep. 509.] But his prayer concluding for general relief, should be in the disjunctive, or (Ibid. and ante, p. 41, note.)

So where complainant is entitled to some kind of relief, on the general facts stated in his bill, if the nature of the relief he is entitled to depends from the existence or non-existence of a particular fact or circumstance which is not within his knowledge, he may allege his ignorance of such fact, and call for a discovery thereof. And in such case he may also frame his prayer in the alternative, so as to obtain the proper relief according as the fact may appear at the hearing of the cause. (Lloyd v. Brewster et al., 4 Paige's Rep. 540-1, 537.)

(1) See the general rule more fully stated and illustrated, p. 190. Note on Parties, p. 397; and p. 34, note.

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S. III.] SEVERAL KINDS OF BILLS.

jurisdiction of the court (l) (1). Who are the necessary parties to a suit will be considered in the next chapter, in treating of demurrers (2); but if any necessary parties are omitted, or unnecessary parties are inserted, the court, upon application, will in general permit the proper alterations to be made. The cases in which this permission is usually granted, and the terms upon which it may be obtained, will be more particularly the subject of consideration in the fourth chapter.

It is the practice to insert in a bill a general Remarks on the charge, that the parties named in it combined together, and with several other persons unknown to the plaintiff, whose names, when discovered, the plaintiff prays he may be at liberty to insert in the bill. This practice is said to have arisen from an idea that without such a charge parties could not be added to the bill by amendment; and in some cases perhaps the charge has been inserted with a view to give the court jurisdiction (3). It has been

bination.

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(1) As to mode of framing the bill, Wilkinson v. Beal, 4 Madd. 408. where a defendant is out of the ju- But see ante, p. 32, note. risdiction, see 1 Sch. & Lefr. 240;

⁽¹⁾ Ante, p. 33, 34, and note post, p. 190. 399.

⁽²⁾ Page 177, et seq., 190, et seq.

^{(3) [}Barton, in his "Suit in Equity," thus remarks upon this sentence: "It becomes me to bow to that gentleman's" (Lord Redesdale's) " more extensive practical knowledge; but I confess myself unable to "apprehend what species of cases it can be to which he alludes. All "cases of confederacy and combination, considered simply as such, ap-"pear to be equally cognizable in a court of law; and it is extremely "evident that a mere allegation of confederacy or combination in a "bill, without other equitable matter to support it, could never author-"ize a court of equity to exercise its extraordinary jurisdiction. And "in the case of a peer (which further rebuts the idea of its being re-

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probably for this reason generally considered, that a defendant demurring to a bill comprising persons whose interests are so distinct that they ought not to be made parties to the same bill, ought to answer the bill so far as to deny the charge of combination. The denial of combination usually inserted as words of course at the close of an answer, is a denial of unlawful combination; and it has been determined that a general charge of combination need not be answered (m). An answer to a charge of unlawful combination cannot be compelled; and a charge of lawful combination ought to be specific to render it material (1). For where persons have a common right they may join together in a peaceable manner to defend that right: and though some of them only may be sued, the rest may contribute to the defence, at their common charge (n): and if on the ground of such a combination the jurisdiction of a court of equity is attempted to be sustained, where the jurisdiction is properly at the common law, the combination ought to be specially charged, that it may appear to warrant the assumption of jurisdiction by a court of equity. From whatever cause the practice of charging combination has arisen, it is still adhered to, except in the case of a peer, who was never charged with

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⁽m) See Oliver v. Haywood, 1 (n) See Lord Howard v. Bell, Anstr. Exch. Rep. 82. Hob. 91.

[&]quot;quisite to give jurisdiction) the charge of combination is omitted."—P. 33.

[[]The charge of combination is often omitted in amicable suits. Wyatt's P. R. 63.]

^{(1) [}Where a particular combination is charged, a particular answer must be given to it. Barn. 263.]

combining with others to deprive the plaintiff of his right, either from respect to the peerage, or perhaps from apprehension that such a charge might be construed a breach of privilege (1).

The rights of the several parties, the injury com- Necessary contents of a bill. plained of, and every other necessary circumstance, as time, place, manner, or other incidents, ought to be plainly yet succinctly alleged. Whatever is Mode of allegaessential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively (n), and with precision (o) (2); but the

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(n) It has been determined, upon 3 Ves. 343; Mayor of London v. demurrer, that it is not a sufficient Levy, 8 Ves. 398; Carew v. Johnthat the plaintiff is so informed. Lord v. Sussman, 2 Ves. & Bea. 323;

1 Ves. Jr. 287; Cressett v. Mytton, C. 2 C. C. E. 296.] 3 Bro. C. C. 481; Ryves v. Ryves,

allegation of fact in a bill, to state ston, 2 Sch. & Lefr. 280; Albreteht Uxbridge v. Staveland, 1 Ves. 56. [Harding v. Hardy, 11 Wheat. 103; (o) See E. I. Comp. v. Henchman, Newkirk v. Willett, 2 J. C. 413, S.

(1) It is wholly unnecessary, and it is therefore the practice of some draftsmen to omit it. See page 50, infra.

(2) The essential statements constituting the case for equitable re- Necessary allelief, have their foundation in what is denominated the stating part, in gations and charges. the formal division of the bill; (49, infra,) which is to sustain also the charging part, (p. 50,) and both to justify the interrogatory part and prayer; (p. 51-6,) each being consecutively dependant. Nevertheless, if the material facts are specifically averred, there appears no positive rule that they must be in the stating part, and formally precede the charging part. They will naturally, however, fall into the former part. See authorities, p. 49, note. Story's Eq. Pl. § 32 a. (4th ed.,) and n. (1). But see Id. § 32, 33. 36, and n. (3).

[The complainant's equity must appear in the stating part of the bill. Flint v. Rives, 3 Ves. Jr. 343; Norbury v. Meade, 3 Bligh. 211; Macnamara v. Sweetman, 1 Hogan, 29. The substance of a bill must contain ground for relief; and there must be equity in the case, when fully stated and correctly applied to the proper parties, sufficient to warrant a decree. Lyon v. Tallmadge, 1 J. C. R. 184; and see Shepherd v. Shepherd, 6 Day's Rep. 37; and Harding v. Hardy, 11 Wheat. 103; Hagthorp v. Hook, 1 Gill & Johns. 270.]

Every bill must contain sufficient matters of fact, per se, to maintain

claims of the defendant may be stated in general

the case, so as the same may be put in issue by the answer, and established by the proofs. The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for its decision: for the pleadings do not put them in contestation. The allegata and probata must reciprocally meet to conform to each other. (The court, per Story, Justice: Harrison et al. v. Nixon, 9 Peters, 502, [503.] 483. Boone v. Chiles, 10 Id. 177.)

But the bill is not only a pleading for the purpose of bringing before the court and putting in issue the material allegations and charges upon which the complainant's right to relief rests, as in a declaration in a suit at law; but it is, also, in most cases, an examination of the defendant upon oath, for the purpose of obtaining evidence to establish the complainant's case, or to counter-prove or destroy the defence which may be set up by such defendant in his answer. The complainant may therefore state any matter of evidence in the bill or any collateral fact, the admission of which by the defendant may be material in establishing the general allegations of the bill as a pleading, or in ascertaining or determining the nature and extent, or the kind of relief to which the complainant may be entitled, consistently with the case made by the bill; or which may legally influence the court in determining the question of costs. (Hawley et al. v. Wolverton, 5 Paige's Rep. 523, 522. 3 Id. 606.)

[So far as the bill acts the part of an examination it must state all such matters of inducement, and such collateral circumstances as may tend to extract a discovery, or which may raise a presumption of the truth of the principal statement, even if denied by the defendant. Lube, 241. If it appears, upon the complainant's own case, that he is not entitled to the relief prayed, the court will not assist him. Stanley v. Robinson, 1 Russ. & M. 527.]

It should be framed to meet the case. The cause must be ultimately decided secundum allegata et probata. Proof is not enough without a suitable allegation to allow its introduction, as allegation would not be enough without proof. (Barque Chusan, 2 Story's Rep. 469. 456.) Thus, where the bill set up title under a will, but relied on title under codicils not alluded to: the bill, it has been held, was fatally defective. (Langdon v. Godard, 2 Story's Rep. 267.) True, the allegata and probata must meet with reasonable certainty, and it may be as important that this rule be adhered to substantially as in a court of law: accordingly where complainant set out an agreement in hac verba, without alleging a loss, and introduced parol evidence of the contents and a purported copy of the original before the Master, the rule was held to

terms; and if a matter essential to the determina-

apply; but nevertheless, the court would not reject the testimony and turn the party out of court, but would permit amendment of pleadings if necessary, especially as it was understood that the object of the parties was to get at the merits; and as "even if the proof were admissible," the copy could not be introduced as secondary evidence, without first showing the loss of the original, which was not done, the court recommended the parties to consent to take further testimony as to the loss. (Smith, Adm'x, v. Axtell et al., Saxton C. Rep. New Jersey, 497-8, et seq. 494.) The true principle for courts of equity should be that which secures specific relief under a prayer for general relief, provided the defendant is not surprised or prejudiced, (see p. 41, note, p. 42.) The same strictness of pleading and proof does not obtain in equity as at law. On bills containing often a variety of complicated detail, it happens almost daily, that a case is made out different in some degree from that stated. The only rule which can be laid down is, that the court will see that defendant is not surprised by a case which he could not be prepared to meet. In general, when evidence is introduced to make out a different case from that stated, it should be objected to, if not at the moment when offered, in the progress of the cause; otherwise it will be deemed waived, and the court will proceed to give relief, if the evidence makes a case for relief. (Hatcher et al. v. Hatcher et al., 1 McMullan's Eq. Cas. South Carolina, 317. 311. And see also, Bank of the U. S. v. Beverly et al., 1 Howard's Rep. 151.)

By the case of Edwards v. Massey, 1 Hawks' North Carolina Reports, 359, it would appear, that, although a bill which is deficient in matter, cannot be aided by the defendant's answer, or by proofs in the cause, yet when sufficient matter is stated, but insufficiently verified, the want of sufficient verification may be supplied by proofs or admissions. The title to the assistance of a court must be exposed by the pleadings. But the style and character of pleading in equity, has always been of a more liberal cast than that of other courts; as mispleading in matter of form there has never been held to prejudice a party, provided the case made is right in substance and supported by proper evidence. Williamson v. Carnan, 1 Gill & Johns. (Maryland) Rep. 184.]

So it seems the allegations and admissions which are a species of proof, must agree. The bill must lay the foundation for any specific relief. Thus, where the answer is broader than the allegations in the bill, and although such parts of the answer as are not responsive to the bill, are not evidence for the defendant; yet where counsel on both sides have considered the facts disclosed as belonging to the case, and

tion of the plaintiff's claims is charged to rest

if the facts in the answer not responsive to the bill, are relied on by complainant's counsel as admissions by the defendant; he is entitled thus far, to their full benefit.

But no admissions in an answer can under any circumstances, lay the foundation for relief, under any specific head of equity, unless it be substantially set forth in the bill. (Jackson v. Ashton, 11 Peters, 248, 229.) Nor can complainant make a new case or departure from his allegations by special replication. He should amend his bill. (7 Id. 274, 252.)

The allegations need not set out all the facts in detail, which are to be proved; but if they do not, they must contain allegations broad enough to cover any evidence offered before it be admissible. After that, confessions or declarations, or documents, or cumulative facts are admissible to support any general allegations to which they apply, and such general allegations are alone often sufficient to render the introduction of such evidence proper. (Nesmith v. Calvert, 1 Woodbury & Minot Rep. 44. 34.) So in Smith v. Burnham, 2 Sumner's Rep. 614, et seq., 622, et seq., 612, it is held that defendant's confessions, conversations and admissions need not be expressly charged, to entitle plaintiff to use them in proof of facts charged and in issue. But see Austinv. Chambers, and Earle v. Pickin, in the notes of the English edition, added to the present note.

[It has been said, that facts charged in a bill, and which are within the defendant's knowledge, are to be taken as admitted if not denied. Mitchell v. Maupin, 3 Monroe's (Kentucky) Rep. 185; Ward v. Lewis, 4 Pickering's Rep. 218; Gibson v. Crehore, 5 Ib. 151. This would seem not to be the practice in the State of New-York. Brockway v. Copp, 3 Paige's Ch. Rep. 539. The complainant must establish them by evidence. Ib. And the practice in Virginia is the same as in New-York. Coleman v. Lynes's Ex'r, 4 Randolph's Rep. 454.] But see Dyett and Wife v. North American Coal Co., 20 Wend. Rep. in Err. 570—5. An'e, p. 30, note, and p. 10, note.

So it is said, that in general a bill is not evidence against the plaintiff, the statements being attributed to the counsel, not to the party. But Chancellor Johnston (South Carolina) said he was in the habit of ruling that any paper signed by a party, much more one sworn to by him, is good as his statement. (Cooper v. Day in Err. 1 Richardson's Eq. Rep. 34. 26. And see ante, p. 10, note, p. 30, note.)

The bill should set forth the plaintiff's equitable interest, and defendant's equitable liability, with so much clearness, certainty and particularity, as to inform the defendant of what he is to meet, and upon what facts as alleged he may take issue. Though the bill should be full and unambiguous as to every material fact, yet it must avoid

in the knowledge of the defendant, or must of

needless prolixity and repetition, impertinent, scandalous and multifarious matter; as to all which, see pp. 49, 50, 57 n., 58 n., 208. These and the further requisites of a good bill, as decided on demurrer, will appear under that head in the text, p. 131, et seq. Their appropriate place might have been under the head of bills, and such seems to have been the view of Mr. Story, who has transferred them accordingly in his Treatise on Equity Pleading.

It may be here remarked, that every claim to equitable relief, must rest upon some existing right, not only to the thing demanded, but to the immediate institution of a suit to enforce it: a suit in chancery being the equitable demand of one's right. This constitutes the plaintiff's equitable interest, or title to sue for relief. The existence of such right, interest or title, presupposes a relationship or privity on the part of the person sued—which must also be shown—for if defendant has no interest, the plaintiff at least as to him, has no right or title.

In setting forth such right and title, the governing principle is, that so much certainty must pervade the statement as to prevent the defendant from being taken by surprise. He must be permitted to know explicitly what the complaint against him is-and not be compelled to guess it, under the form of a general charge. There must be such a specification as will enable him to meet the alleged fact by a direct issue, and thereby countervail the general charge, whether it be of fraud, mistake, accident or trust. But after alleging such specific act or fact, the plaintiff need not set forth minor circumstances, merely going to make out or corroborate such specification. Some English cases have gone the length, however, of requiring minute particulars. time, place and witnesses' names; where plaintiff's claim rests on defendant's confession or declarations. But this was under the peculiar secrecy of the old English mode of examination by interrogatories, which before publication, the defendant had no opportunity of counteracting, and hence it accorded with the principle of preventing surprise as stated. But the doctrine nor the reason does not prevail in this country. Here the received general rule is, that matters constituting the evidence of the specific fact, need not be stated, though it may be sometimes important to elicit an examination of defendant on oath, to set out and interrogate him on circumstantial points essential to sustain the main fact.

The statement of the facts, if necessarily known by plaintiff, must, as a general rule, be positive and precise. But in New-York, under the old chancery regime, facts might be set forth positively or on information or belief, and the jurat corresponded. But now by the Code of Procedure, (and see infra, 49, note,) they are to be stated in concise, ordinary and plainly intelligible language, and sworn to on belief.

necessity be within his knowledge, and is conse-

By that Code, § 134, neither presumptions of law, nor matters of which judicial notice is taken, need be stated in a pleading. But this enactment is merely declaratory of the pre-existing law on the subject. (See Story's Eq. Pl. c. 2, § 24. Gresly, Greenleaf and Phillips, on Evid.)

I. With respect to a want of sufficient particularity-

Allegation to show that the statute of limitations had not run against an equity of re demption.

Where a mortgage debt has been due for more than twenty years, a general allegation that all interest has been paid, is not sufficient to support a proof that interest was paid from time to time, during the twenty years, so as to prevent the statute of limitations from operating; for, consistently with the truth of this allegation, the interest might have been paid in a lump. Gregson v. Hindley, 10 Jur. 383 .-V. C. E.

Where the bill is brought after great lapse of time, it should state the reasons why it was not brought before, so as to repel the presumption of latches or improper delay. If the case turns upon fraud, mistake, concealment or misrepresentation, the charges thereof must be reasonable, definite and certain as to time, occasion and subject matter, and especially when, how and what the discovery of the fraud, &c. is, so as the court may see, if by ordinary diligence the discovery might have been made before, for if so, the bill lies not on account of latches. (Stearns v. Page, 1 Story's Rep. 214-215. 204.)

Statement or charge in a bill to obtain an interest accruing on an intestacy.

If a bill prays that the trustee of leasehold property may be declared to be a trustee for the plaintiff, as claiming through a person to whom it accrued by an intestacy, the bill must state or charge that the intestate did not dispose of or incumber the property, and that it was not applied in or required for the payment of his debts. See Stephens v. Frost, 2 Y. & C. Eq. Ex. 297.

Allegation of a

In stating a title by descent in the plaintiff, it is necessary that all titie by descent. the links which constitute the chain of descent should be stated. Baker v. Harwood, 7 Sim. 373.

Allegation that a defendant is a representative of a firm.

An allegation that a defendant is the representative of a firm is not sufficient to admit proof of circumstances which might have made that party not only a representative, but actually the party carrying on the business. Schneider v. Lizardi, 15 Law J. (N. S.) 435, M. R.

Allegation as to a foreign instrument being void.

Where a foreign instrument is intended to operate according to a law which is not known in England, and which, as foreign law, is to be proved as a fact to the cause, an allegation that such instrument is void is too vague. The Duke of Brunswick v. The King of Hanover, 6 Beav. 59.

Statement or charge of ad-missions, by a defendant.

Where a plaintiff means to rely on an admission made to a person whom he intends to examine as a witness, it is necessary that he should state or charge, not merely that such an admission was made, but that it was made to that person, in order to give the defendant an opportunity of cross-examining such person, or of otherwise meeting the

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quently the subject of a part of the discovery

case made upon the evidence. Austin v. Chambers, 6 Cl. & Fin. 38. And where a plaintiff proceeds against a defer dant upon the ground of admissions made by the defendant of his having had notice, he ought to mention in the bill the date of such admissions, and the names of the persons to whom they were made, in order to give the defendant an opportunity of meeting the case. Earle v. Pickin, 1 Russ. & M. 547.

Letters proved in the cause, but not referred to in the pleadings, are Letters and coninadmissible in evidence, even on the question of costs. Whitley v. put in issue. Martin, 3 Beav. 226.

Conversations not put in issue cannot be used in evidence. But when communications are stated in the answer, the plaintiff has a right to show the real nature of those communications, although they are not referred to in the bill. Graham v. Oliv r, 3 Beav. 124. But see Hughes v. Garner, 2 Y. & C. Eq. Ex. 328.

Where a bill seeks to restrain a defendant from prosecuting an ac- Allegation of action for a damage caused by a nuisance, and, as a ground for such re-nuisance, lief, it alleges that he acquiesced in and encouraged the erection causing the nuisance, such an allegation is sufficient to let in evidence of such particular acts of encouragement as would amount to an equity against the defendant; and a demurrer for want of equity, on account of the generality of the allegation, will not lie, although it may turn out that there is not evidence of such an encouragement as will constitute an equity. Williams v. Earl of Jersey, Cr. & Phil. 91.

Where a bill charges generally that there are errors in an account, and that they appear in a certain report of an accountant in the plain. tiff's possession, which the bill calls upon the defendant to inspect, referring to but it does not specifically point out the errors; neither that report nor plaintiff's posevidence of the errors pointed out in it can be recorded, although the report is stated, and the alleged errors in the account are explained in a cross bill by the defendant. Shepherd v. Morris, 4 Beav. 252.

Charging errore

Where a bill impeaching a voluntary settlement on the ground of Reference to a the indebtment of the settlor, does not state the particulars of the schedule in the debts, but refers to a schedule of debts in the Insolvent Debtors' Court, Insolvent Court. in aid of the suit; the existence of the debts is not sufficiently put in issue, as against an infant or a married woman, but an inquiry will be directed on the point. Townsend v. Westacott, 2 Beav. 340.

II. With respect to the mode of putting a specific allegation-

A statement that "the defendant alleges, and the plaintiff believe the fact to be," is not a sufficient allegation of a material fact. Egre- lief. mont v. Cowell, 5 Beav. 620.

A charge that the contrary of a pretence is the truth, is equivalent Charge of the to an allegation of the negative of the fact pretended. (Harrison v. pretence. Wiltshire, 4 Law J. Ch. Rep. (N. S.) 260. (Lord Commissioner Shad-

sought by the bill, a precise allegation is not required (p) (1).

(p) See Baring v. Nash, 1 Ves. & Bea. 551. (See p. 42, note,) 4 Paige's Rep. 540—1.)

well.) So that a bill, by charging the contrary of a pretence that a right has not been established at law, sufficiently avers the establishment of the right at law. The Mayor, Aldermen, and Burgesses of Rochester v. Lee, 15 Law J. Ch. Rep. (N. S.) 97.

Stating a title to be either at law or in equity. If a bill insists that a will was a good execution of a power at law, and, if not, in equity; and then prays that the defect, if any, may be supplied against the defendant, the bill is demurrable: for the court cannot act upon an hypothetical bill, desiring relief either at law or in equity, according to the result of the argument. Edwards v. Edwards, Jac. 335.

III. With respect to the rule of construction-

Allegations are to be taken most strongly against the party making them. Benson v. Hadfield, 5 Beav. 546.

Allegation of a breach of trust.

And hence, in order to charge a party with a breach of trust, it is necessary that the case made against him by the bill should be such as to be incapable of being construed otherwise than as a case of a breach of trust. Attorney General v. The Mayor of Norwich, 2 My. & C. 406.

Alternative allegations.

Where a party makes alternative allegations, the opposite party is entitled to adopt whichever of the alternative allegations he pleases. Williams v. Flight, 5 Beav. 41.

Allegation that a lessor was "seised or otherwise well entitled."

Where a bill of discovery is filed in aid of an action of covenant which could not be sustained unless the person granting the lease containing the covenant had the legal estate, and the bill states that such person was "seised or otherwise well entitled," and there are no other expressions showing that he had the legal estate, the defendant has a right to take the statement most against the pleader, and as meaning that the lessor was "otherwise entitled," or had an equitable title only. Balls v. Musgrare, 3 Beav. 284.

Construction of a single ambiguous word.

Although it is a rule that an allegation is to be taken most strongly against the pleader, yet where a word may per se be understood in two different senses with equal fairness, and if understood in the one sense the bill would be demurrable, whereas if understood in the other sense, the bill would be correctly framed, the former construction will be adopted: as where a bill for tithes is filed by a lessee thereof and by the vicar, and the bill states that the vicar "demised" the tithes to the lessee, and the vicar would be improperly made a co-plaintiff, if the demise were by deed, but not if it were by parol. Foot v. Bessant, 3 Y. & C. Eq. Ex. 320.

(1) If a bill for relief is so vague that it does not state any certain

As a bill must be sufficient in substance, so it must have convenient form (q). The form of an Parts of a bill. original bill commonly used consists of nine parts; -(1). The first part is the address of the bill to Address. the person holding the great seal, the terms of which are always prescribed by the court upon every change of the custody of the seal, or alteration in the style of the person to whom it is com- Names and demitted (2). In the second place are contained the plaintiffs.

(q) 9 Edw. IV. 41. Prac. Reg. 57 Wy. Ed.

case upon which a court of equity will grant relief, it will be demurra- Bill demurrable ble for want of equity, although the plaintiff alleges his inability to for variouses state circumstances more definitely, and prays a discovery. Wormald v. De Lisle, 3 Beav. 18.

Allegations that an heir was brought up in poverty and without education, and kept in ignorance of his rights, and supplied with small sums of money, are too vague allegation's of fraud to support a bill of discovery. A bill so framed is designated a fishing bill. Munday v. Knight, 3 Hare, 497.

- (1) [This division of a bill into nine parts is considered by Lube as "illogical and incorrect." He makes only four, thus: 1. The circumstantial statement of the relation, including the inducement or introductory part. 2. The incidents which produce the grievance complained of, including the requests made to the defendant, and his refusal. 3, The statement of such collateral circumstances, if necessary, by way of charge, as may compel the defendant to acknowledge the grievance, or which may anticipate and controvert his defence. 4. And lastly, by reason of the foregoing complaint, and of the want of adequate remedy at common law, it concludes with a petition for the subpæna, to the end that the defendant may answer the premises and the court decree relief .- P. 242,]
- (2) The forms of the commencement as well as every other parts of bills may be seen in Willis's Equity Pleadings, Van Heythuysen's Equity Draftsman, Barton's Suits in Equity, Barbour's and other American Books of Equity Practice. Story, in referring to the forms of address, (Eq. Pl. § 25, n. 2,) is not correct in saying that in New-York the address would be "To the Honorable J. K." &c. By express rules of the court of chancery, it would have simply been "To the Chancellor of the State of New-York," without name or addition. But since the abolition of that court, no address appears necessary. On the amalgamation in that state of legal and equitable forms of

names of the parties complainants, and their de-

remedy, pleadings are reduced to complaint, demurrer, answer and replication. (Code of Procedure, § 132.) The complaint is to contain: 1. "The title of the cause, specifying the name of the court in "which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to "the action, plaintiff and defendant. 2. A statement of facts constituting the cause of action, in ordinary and concise language, without "repetition, and in such manner as to enable a person of common understanding to know what is intended. 3. A demand of the relief, to "which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated." Code of Procedure, § 120.

Under this sweeping reform in New-York, the necessity of adhering to the nine formal divisions of Mitford, or the four of Lube, obviously disappears. But the principles of pleading, both at law and in equity, are in many instances intimately blended with the very foundation of the right, the enforcement of which, and the redress of an invasion of which, "is the very object of the complaint." "No rule of law by which rights and wrongs are measured," say the Commissioners in their report, (p. 146,) are touched "the change being only the removal of old obstructions, in the way of enforcing the rights and redressing the wrongs." Nevertheless, in the determination of what is right and wrong, or of equitable interests and liabilities, as well as for a concise and plainly intelligible statement of facts, it may be conceived, that a knowledge of the principles that have governed equity pleading, and the substantial portions of many of its forms, would still be useful, if not indispensable to the successful framing of the "complaint." Many of those principles evolve a practical exposition of relative rights, and many of the forms point out with admirable precision, the best mode of presenting those rights, and their invasion, to the judgment of the proper tribunal. But mere formal outlines of a bill of complaint, or of a petition, are demolished; and the structure reduced to the simplicity of an ancient bill, (of which see a precedent note, p. 50, infra;) combining but little more than a clear and coneise statement of facts. Even the charging part, which might have been an important part, to anticipate the defendant's defence and put him to an examination on oath, in respects of the facts charged, may now be rendered perhaps entirely unnecessary, or be supplied by a special replication to the answer, (Code of Procedure, c. 4, § 131;) heretofore inadmissible, but by leave; and by the power of either party to examine the other as a witness; (Id. Tit. 12, c. 6, § 343, et seq.,) or any other person interested in the event of the suit. (Id. c. 7, § 351, &c.)

scriptions (r) (1), in which their abode is particularly required to be set forth, that the court, and the parties defendants to the bill, may know where to resort to compel obedience to any order or process of the court, and particularly for payment of any costs which may be awarded against the plaintiffs, or to punish any improper conduct in the course of the suit (2). The third part contains the Stating-part. case of the plaintiffs (3), and is commonly called the

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(r) It seems, however, that the the truth thereof, see Albretcht v. description, so given, of a plaintiff, is Sussman, 2 Ves. & Bea. 323. not considered to be an allegation of

The relief is granted as demanded, if no answer; otherwise the court will grant any relief, though different from that asked, consistent with the case made by the plaintiff and embraced within the issue. (Id. § 231.)

- (1) [See the different forms of introduction, names and descriptions in Chapter I. of Willis's Equity Pleadings, and Equity Draftsman, Chap. I.
- (2) By the ancient practice defendant might demur, or if the residence was untruly stated, plead. But the modern practice is to apply for order for security for costs. But whether a demurrer lies, the court expressed no opinion, though 1 Daniel Ch. Pr. 463, is cited as a recent work of much merit, in favor of a demurrer. (Howe v. Harvey, 8 Paige's Rep. 73-75.) It seems that Lord Redesdale, in his first edition of this Treatise, said, a demurrer would hold for omitting to make the proper description of the parties as to abode, &c., but having left it out in after editions, it is inferred that he had "changed his opinion." Story's Eq. Pl. c. 2, § 26, n. 1, on authority of Montague's Eq. Pl. "If," says Story, "a special demurrer would not be proper, perhaps a plea, in the nature of a plea in abatement, might be the proper mode to enforce the objection." (Ib.) In New-York, by the recent Code of Procedure, no such description of the residence of parties, seems to be required. See note, supra.

In the United States courts, where the jurisdiction depends on the citizenship of the parties being of different states, the fact of the complainant being a citizen of a certain state and the defendant of another, must be alleged in the bill. See Story's Eq. Pl. c. 2, \ 26, and authorities there cited.

(1) There is no rule that a fact on which the plaintiff's title to re-

Charge of con- stating-part of the bill (s) (2). In the fourth place is the general charge of confederacy against the persons complained of, which has been already mentioned as commonly inserted, though it seems unnecessary. Fifthly, if the plaintiffs are aware of a defence which may be made, and have any matter to allege which may avoid it, the general

Charging-part.

(s) See 11 Ves. 574.

Introduction of charging part.

lief depends, if introduced by way of charge, is not as well pleaded as if it were introduced in the shape of what is technically called a statement, where such charge is a specific averment of the fact. Houghton v. Reynolds, 2 Hare, 264; and see Harrison v. Wiltshire, 4 Law J. (N. S.) 260. and The Mayor of Rochester v. Lee, 15 Law Ch. R. J. (N. S.) 97, supra, p. 47, n. and p. 45, note.

(1) It has been held that the rules of pleading require that every material averment that is necessary to entitle the plaintiff to the relief prayed for, must be contained in the stating part of the bill; that this is a useful rule for the preservation of form and order in the pleadings; that this part of the bill must contain the plaintiff's case and his title to relief; and every necessary fact must be distinctly and expressly averred, and not in a loose and indeterminate manner, to be explained by inference, or by reference to other parts of the bill, and that the defendants are not bound to answer any averment not contained in the stating part of the bill. Thus, where the plaintiff sought to hold the purchaser of land accountable for the application of the purchase money, and the stating part of the bill alleged that a deed of the land was placed in' the hands of D. on the express trust'and condition that he should not deliver it to the purchaser but upon payment of one-half of the purchase money, which D. had contracted to pay over to the plaintiff, and that the deed was delivered to D. the purchaser having knowledge of the trust, but omitted to state whether the purchaser did or did not pay to D. one-half of the money, the bill was held to be defective, because if the purchaser did pay one-half of the money, he was not bound to see to its application. (Wright v. Dame et al., 22 Pick. Rep. (Mass.) 59. 55.)

The foundation for subsequent parts of the bill should doubtless be more properly laid in the stating part; but that no substantive averment in any other part need be made or answered, is in conflict with other adjudications. See English editor's note, p. 49. See charging part, note, infra. And ante p. 45, note.

charge of confederacy is usually followed by an allegation that the defendants pretend or set up the matter of their defence, and by a charge of the matter which may be used to avoid it. This is commonly called the charging-part of the bill, and is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant's case, or to put in issue some matter which it is not for the interest of the plaintiffs to admit: for which purpose the charge of pretence of the defendant is held to be sufficient (t). Thus if a bill is filed on any equitable ground by an heir, who apprehends his ancestor has made a will, he may state his title as heir; and alleging the will by way of pretence of the defendant's claiming under it, make it a part of the case without admitting it (1). The

(t) 3 Atk. 626; 11 Ves. 575. See also Flint v. Field, 2 Anstr. 543.

⁽¹⁾ To examine defendant on oath for the purpose of discovery, (which is the principal object of exceptions to an answer for insufficiency, where any material allegation, charge or interrogatory is not fully answered,) the complainant may even anticipate the defence of defendant and obtain a discovery of matters connected with such defence, which are in no wise responsive to the main charges in the bill, upon which the complainant's equity is supposed to rest. The proper method of obtaining such discovery, however, is not by exceptions for insufficiency founded upon the answer alone, but by framing the bill in such a manner as to call for all the particulars of the defence, which it is supposed the defendant will set up. This is effected by what is usually called the charging part of the bill, in which the anticipated defence is stated as a pretence of the defendant, supported by proper charges and interrogatories founded upon such alleged pretence. In this way complainant is not only enabled to anticipate the defence itself, by putting other matters in issue which will have the effect to displace the equity thereof, but he is also enabled to examine the defendant on interrogatories in relation to all the particulars of such defence. (Stofford v. Brown, 4 Paige's Rep. 90-1. 88.) The charging part is as necessary to be answered as the stating part; so far as the charges are material to anticipate and defeat a defence

Allegation of justisdiction of the suit to the court by a general averment that

which may be set up, they may be considered in the nature of a special replication. But complainant has the same right to defendant's answer to the charging part of the bill, to prove the truth of his special replication, as he has to answer to the stating part to prove the truth of that. If he do not waive answer on oath, he makes defendant a witness in favor of complainant against himself, and interrogates him to every statement and charge in the bill. His answer, therefore, which is responsive to any such statement or charge in whatever part. of the bill it is contained, is evidence in his own favor, as well as in favor of the complainant. (Smith v. Clark, 4 Paige's Rep. 373, 368.) But if not responsive it is not evidence. (Stafford v. Brown, Id. 91; see on this point, ante. p. 10, note.) The charging part has been thought by many to be mere form, and that they might put in any thing by way of charge, even in a sworn bill. It is frequently, however, as material a part of the bill as the stating part, and the decision frequently turns on the issue formed by the denial of some averment in the charging part. It is therefore perjury for complainant to make a false charge or averment in the charging part of a sworn bill; as it would to make a false statement in the stating part. (Smith v. Clark, supra.)

[See a precedent of such an allegation, (as the one suggested in the text,) 1 Equity Dra'tsman, (2d edit.) 321. The charging part of a bill, says Willis, p. 19, is often omitted. Until a comparatively modern period, a bill contained little more than the stating part, with a simple prayer, that the defendant might answer the matters contained in it, and for relief; and it is certain that the late Lord Kenyon in the bills he drew when at the bar, never put in the charging part; which does little more than unfold and enlarge the statement. See Partridge v. Haycraft, 11 Ves. 574—5.

It may not be amiss to give here the form of an ancient bill. We copy it from the proceedings of the Record Commission. It was filed in the reign of Henry V., to compel a defendant to surrender a messuage which was the inheritance of the plaintiff Katharine. The reader will perceive in how small a compass the whole is contained; and yet how completely it takes in the equity of the case:

[&]quot;To the reverend father in God, the Bishop of Winchester, Chancel-"lor of England:

[&]quot;Beseecheth humbly your poor orator, John Bell of Calis, soldier, "and Katharine, his wife, that whereas William atte Woode, otherwise called William atte Doune of Rochester, father to the said Katha-

the acts complained of are contrary to equity, and tend to the injury of the complainants, and that they have no remedy or not a complete remedy, without the assistance of the court; but this averment must be supported by the case shown in the bill, from which it must be apparent that the court has jurisdiction (1). The bill having shown the title of answer; the persons complaining to relief, and that the court has the proper jurisdiction for that purpose, in the seventh place prays, that the parties complained of may answer all the matters contained in the former part of the bill, not only according to

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"rine, since dead, heretofore was seised in his demesne as of fee of "one messuage with the appurtenances in Rochester, situated in the "churchyard there, the which, William, in the feast of St. Michael, in "the twenty-second year of the reign of King Richard the Second, " since the conquest, let to farm to one Simond Stellhard of Gillingham, "the same messuage with the appurtenance for term of seven years "then next ensuing, for a certain sum to him annually to be paid; "the which Simon within the first two years was ousted by the execu-"tors of the said William, because he would not attorn to them in the "payment of the rent of the same messuage, the which messuage " since then was several times alienated to divers persons, and now so "it is, very gracious lord, that one Piers Savage, now occupier of the " same messuage, for the which messuage he hath not paid more than "one mark, hath oftentimes been required to deliver to the same John "and Katharine, this same messuage as the heritage of the same "Katharine, and he hath not delivered it to them nor yet will, but de-"tains it in destruction of their poor estate and perpetual disherison of "the same Katharine, if they should not obtain remedy by your gra-"cious aid in this behalf, and the which John and Katharine are so "poor, and the said John so ill, that they cannot pursue the common "law. Please your very gracious lordship to consider the premises, "and thereupon to grant a writ directed to the said Piers, to appear, "before you at a certain day upon a certain pain by you to be limited, "for to answer of the matter aforesaid, and to do right as good con-"science demandeth it, and this for love of God, and in work of " charity."]

(1) The remark already made as to the charge of combination (note to page 45) is also applicable to the jurisdiction clause.

their positive knowledge of the facts stated, but also according to their remembrance, to the information they may have received, and the belief they are unable to form on the subject (1). A principal end of an answer upon the oath of the defendants, is to supply proof of the matters necessary to support the case of the plaintiffs; and it is therefore required of the defendants, either to admit or deny all the facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it, and also to declare themselves unable to form any belief concerning it (2). But as experience has proved that the substance of the matters stated and charged in a bill may frequently be evaded by answering according to the letter only, it has become a practice to add to the general requisition that the defendants should answer the contents of the bill, a repetition, by way of interrogatory, of the matters most essential to be answered, adding to the inquiry after each fact an inquiry of the several circumstances which may be attendant upon it, and variations to which it may be subject, with a view to prevent evasion, and compel a full answer (3). This is commonly

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including the interrogating part.

⁽¹⁾ The 19th order of Aug. 1841, prescribes the form of this part of the bill. See *infra*, page 52, note.

⁽²⁾ Where the bill requires answer to pertinent interrogatories, according to knowledge, information and belief, defendant must respond not merely to his knowledge, but information, if any, derived from others, and his belief which all of his knowledge and information have produced. (Kittredge v. Claremont Bank et al., 1 Woodbury & Minot Rep. Ct. Court of U. S., 246—7. 244.)

Object of particular interrogatories.

⁽³⁾ Another object for which particular interrogatories are put is to call the matters of which discovery is sought to the remembrance of the

termed the interrogating-part of the bill (1); and

defendant, where he might otherwise inadvertently and not through wilful evasion, state that he was unable to afford information.

The usual way of interrogating as to a document in a bill, is, to ask Interrogatories generally, whether it was not in the words and figures, or to the pur- as to documents. port and effect thereinbefore in that behalf mentioned and set forth, or in some other and what words and figures, or to some other and what purport and effect? But if the defendant says he is unable to set forth whether it was to the purport and effect stated, or to what other purport or effect; and yet it is a document to which he himself was a party, or of the purport or effect of which it is probable that he has some knowledge, it may often be expedient to amend the bill by interrogating him step by step as to particulars expressed in the document, in order to direct his attention to each point, and suggest to his mind some points which he may remember when thus particularly interrogated as to them. In Nelson v. Pon ford, 4 Beav., Lord Langdale, M. R. observed, "It is probable that the defendant knows more than is stated in the answer. He has not, however, been interrogated, step by step, as to the rent and the other particulars of the agreement. It is possible he may be able to answer some of the particulars in detail, if put to him by amendment." Although the allegata and probata must agree, and the premises or case made in the stating and charging parts, form the basis of the interrogatories and of relief, (see p. 45, note,) yet if an interrogatory not growing out of the matter stated or charged be answered, and the answer replied to, it cures the informality and puts the matter in issue; "for a matter may. be put in issue by the answer, as well as by the bill, and if replied to, either party may examine to it." (See authorities quoted by Story, Eq. Pl. § 36 and n. 3, supra, p. 45, note.)

(1) By the 16th order of August, 1841, "A defendant shall not be Orders of Aug. bound to answer any statement or charge in the bill, unless specially regatories and and particularly interrogated thereto; and a defendant shall not be answer them. bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent."

By the 17th order, "The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c., and the interrogatories which each defendant is required to answer, shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say—' The defendant (A. B.) is required to answer the interroga-

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as it was originally used only to compel a full answer to the matters contained in the former part of the bill, it must be founded on those matters (u).

(u) 1 Ves. 538; 6 Ves. 62; Faulder v. Stuart, 11 Ves. 296; Bullock v. Richardson, 11 Ves. 373; 11 Ves. 574.

tories numbered respectively 1, 2, 3, &c., and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill."

By the 18th order, "The note at the foot of the bill specifying the interrogatories which each defendant is required to answer, shall be considered and treated as a part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill."

By the 19th order, "Instead of the words of the bill now in use preceding the interrogating part thereof, and beginning with the words 'To the end therefore,' there shall hereafter be used words in the form or to the effect following: To the end, therefore—That the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer; that is to say—

1. Whether, &c.

2. Whether, &c."

The 17th order of August, 1841, was intended to apply to cases in which there were several defendants answering separately. Bate v. Bate, 7 Beav. 528.

And this order does not require a number to be prefixed to each interrogatory, but merely that the various portions of the interrogating part should be divided and distinguished from each other by numbers, as conveniently as may be, in order clearly to point out to each defendant what part of the bill he is required to answer.

And where a defendant is required to answer to an interrogatory of a specified number, he must answer not only the question to which the number is immediately prefixed, but all others, if any, that may come under that number, or in any other words, all others, if any, that intervene between that question and the next number. Boutcher v. Branscombe, 5 Beav. 541.

Therefore, if there is nothing in the prior part of the bill to warrant an interrogatory the defendant is not compellable to answer it: a practice necessary for the preservation of form and order in the pleadings, and particularly to keep the answer to the matters put in issue by the bill. But a variety of questions may be founded on a single charge, if they are relevant to it (y) (1). Thus, if a bill is filed against an executor for an account of the personal estate of his testator upon the single charge that he has proved the will may be founded every inquiry which may be necessary to ascertain the

(y) 1 Ves. 318; 11 Ves. 301.

A defendant is not bound to answer interrogatories asking a disclosure of matter no way connected with or material to the case. Hagthorp v. Hook, 1 Gill & Johns. 270.]

In Massachusetts by rule of chancery, the bill concludes with a general interrogatory. But complainant may, when his case requires it, propose specific interrogatories; and may allege by way of charge any particular fact, for the purpose of putting it in issue. The common charge of fraud and combination are omitted, excepting when intended to be charged specifically. (Rule 4; 24 Pick. Rep. 411.)

^{(1) [}And see notes to Jerrard v. Sanders, 4 Bro. C. C. 322. (Eden's edit.) At first view the repetition of the whole bill, by way of interrogation, would appear a very useless prolixity. But experience has proved the utility of this practice, beyond cavil: for the contrary method would not fail to produce still greater expense and delay to the parties, by occasioning frequent and numerous exceptions and amendments. The statement must, of necessity, be direct and positive; and if the defendant thought it his interest to do so, he might content himself with answering it according to the letter. The great object of the interrogating part of a bill is, to preclude evasiveness in the answer; and the whole attention of the draftsman must be turned to this single point of putting the question in every variety of form, to elicit a full and definite reply, and to prevent the defendant's having any loop-hole to escape upon a negative pregnant. In fact, this part of the bill is altogether subservient to the office which the bill performs, of an examination; and should, therefore, omit nothing essential to the proof and elucidation of the statement. Lube, 271-2.

amount of the estate, its value, the disposition made of it, the situation of any part remaining undisposed of, the debts of the testator, and any other circumstance leading to the account required (1). The Prayerfor relief, prayer of relief is the next and eighth part of the bill, and is varied according to the case made, concluding always with a prayer of general relief, at Prayer for pro- the discretion of the court (x) (2). To attain all the ends of the bill, it, ninthly and lastly, prays that process may issue (y) requiring the defendants to

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(x) Vide sup. p. 40.

Fawkes v. Pratt, 1 P. Wms. 593; (y) They alone are defendants and Windsor v. Windsor, Dick.

against whom process is prayed. See 707. (3)

(2) [If a party is made a defendant, and no relief is prayed against him, the bill will, as to him, be dismissed. Patterson v. Same, 1 Havw. 167.]

^{(1) [}See precedent, Willis, 186. Story's Eq. Pl. § 37, n. 4, 4th edit., thinks the proposition in the text " is stated too broadly, and that there should be a charge not only that the executor had proved the will, but that he had received assets, in order to found the interrogatories."

^{(3) [}A person does not become a party merely because his name is mentioned in it. By the English practice, the plaintiff may complain and tell stories of whom he pleases, but they only are defendants against whom process is prayed, issued and served. And see Elmendorf v. Delancey, Hopk, 555; Executors of Brasher v. Van Cortland, 2 J. C. R. 244; Bond v. Hendricks, 1 Marsh. 594; Windsor v. Windsor, 2 Dick. 707; Neve v. Weston, 3 Atk. 547; Peach v. Ventner, 1 Ch. R. 252; Verplanck v. Mercantile Ins. Co., 2 Paige, 438; Lyle v. Bradford, 7 Monroe, 113. In the state of New-York, the writ of subpæna is issued of course; and, therefore, a formal prayer in the bill is not necessary to entitle the complainant to the process of the court. But still it is necessary that every bill should clearly display the persons who are impleaded as defendants. Elmendorf v. Delancey, supra. Thus, where there was no prayer of process against a corporation by its corporate name, but only against the officers thereof, and the corporation was not described in the bill as being a party thereto, it was held, that the corporation was not before the court as a party to the suit. Verplanck v. Mercantile Ins. Co. su; ra.]

appear to and answer the bill, and abide the determination of the court on the subject; adding, in case any defendant has privilege of peerage, or is a lord of parliament, a prayer for a letter missive before the prayer of process; and in case the attorney-general, as an officer of the crown, is made a defendant, the bill, as before observed, instead of praying process against him, prays that he may answer it upon being attended with a copy (1). For the purpose of preserving property in dispute prayer for an in-pending a suit, or to prevent evasion of justice, the writ of ne excel court either makes a special order on the subject, or issues a provisional writ; as the writ of injunction, to restrain the defendant from proceeding at the common law against the plaintiff, or from committing waste, or doing any injurious act (z); the writ of ne exeat regno to restrain the defendant from avoiding the plaintiff's demands by quitting the kingdom (a); and other writs of a similar na-

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writ of injunction will not be granted unless prayed for by a bill which is already filed, Savory v. Dyer, Ambl. 70, or under special circumstances, which the party applying undertakes to file forthwith. M' Namara v. Arexceptions to this general rule, see

(z) It is a general rule, that the Casamajor v. Strode, 1 Sim. & Stu. 381; Amory v. Brodrick, 1 Jac. Rep.

(a) It seems requisite that the writ of ne exeat regno should be prayed for by bill. Anon. 6 Madd-276; unless the application be made thur, 2 Ball & B. 349; but there are in a cause depending. Collinson v. ----, 18 Ves. 353; Moore v. Hudson, Wright v. Atkyns, 1 Ves. & B. 313; 6 Madd. 218; see further on the

In a late case in 9 Paige's Rep. the English rule is adhered to, that a person against whom process of subpæna is not prayed, although named in the bill, is not a defendant to the suit.

⁽¹⁾ See note to page 11, supra. [See forms of prayer, Willis, 7; Equity Draftman, 2d edit., 6, 7.] Subporna between state and state, is directed to and must be severally served on the Governor and Attorney General of the defendant state. (The State of New Jersey v. The People of the State of New-York, 3 Peters, 461. Forms, 467-8, n. (a).)

ture. When a bill seeks to obtain the special order [47] of the court, or a provisional writ, for any of these purposes, it is usual to insert, immediately before the prayer of process a prayer for the order or particular writ which the case requires; and the bill is then commonly named from the writ so prayed, as an injunction-bill, or a bill for a writ of ne exeat regno (1). Sometimes the writ of injunction

cited, Leake v. Leake, 1 Jac. & W. Russ. 598.]

subject of this writ, Hyde v. Whit- 605; Graves v. Griffith, 1 Jac. & field, 19 Ves. 342; Raynes v. Wyse, W. 646; Blaydes v. Calvert, 2 Jac. 2 Meriv. 472; Flack v. Holm, 1 Jac. & W. 211; Pannell v. Taylor, 1 & W. 405, and the cases therein Turn. Rep. 96. [Grant v. Grant, 3

Ne exeat not granted unless prayed for.

(1) A ne exeat will not be granted, unless prayed for by the bill, at least where it appears that the plaintiff at the time of filing the bill knew that the defendant intended to leave the kingdom. Sharp v. Taylor, 11 Sim. 50. But in New-York and elsewhere, it has been regarded as not indispensable, that this process should be prayed for in the bill. It might be granted on cause, or petition or motion after bill And more particularly where plaintiff had, at the commencing of his suit, no reason to suppose defendant meant to depart. (See the cases infra, and those cited by Story Eq. Pl. § 44, n. 2, 4th edit.) The writ is abolished in New-York, a simple order from a judge substituted. See Code of Procedure, tit. 7, 1.

The object of the writ of ne exeat is to obtain equitable bail, and may be applied for in any stage of the suit. In Stewart v. Stewart, 1 B. & B. 73, a ne exeat was granted against a complainant who was about to leave the country before the decree for costs could be made effectual against him. Dunham v. Jackson, 1 Paige's Ch. Rep. 629; Mitchell v. Bunce, 2 Ib. 606. The debt for which the writ issues must be equitable, (save in a matter of account), must be due, and must be such a debt that the sum to be marked upon the writ can be ascertained. Boehm v. Wood, 1 Turn. & R. 332; Seymour v. Hizard, 1 J. C. R. 1; Porter v. Spencer, 2 Ib. 169; Smedburg v. Mark, 6 Ib. 138; Mitchell v. Bunce, supra. To sustain the application for a writ of ne exeat, sufficient equity must appear on the face of the bill. Woodward v. Shatzell, 3 J. C. R. 412.

It seems that a writ of ne exeat is not granted on petition and motion only, without a bill being previously fi'ed. Mattocks v. Tremain, Ib. 75. In the state of New-York, the writ of ne exeat is not a prerogative writ. In a proper case this writ is of right, and not discretionary. Gilbert w. Colt, Hopk. Rep. 496.]

is sought, not as a provisional remedy merely, but as a continued protection to the rights of the plaintiff; and the prayer of the bill must then be

framed accordingly.

These are the formal parts of an original bill as Remarks on the usually framed. Some of them are not essential, insertion of the several foregoing parts. and particularly it is in the discretion of the person who prepares the bill, to allege any pretence of the defendant, in opposition to the plaintiff's claims, or to interrogate the defendant specially. The indiscriminate use of these parts of a bill in all cases has given rise to a common reproach to practisers in this line, that every bill contains the same story three times told (1). In the hurry of business it may be difficult to avoid giving ground for the reproach; but in a bill prepared with attention the parts will be found to be perfectly distinct, and to have their separate and necessary operation.

The form of every kind of bill bears a resem-form of being ordinary original bill. but there are neblance to that of an original bill; but there are necessarily some variations, either arising from the

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^{(1) [}See Macnamara v. Sweetman, 1 Hogan, 29.]

[[]The framing of bills is usually the province of the junior counsel; it is of great importance, and requires much knowledge and judgment. In no other science is so much expected from the younger members. In all perplexed and difficult questions, it is prudent to have the opinion of some senior counsel upon the fitness of the bill for its intended purpose; it may ultimately save much expense and disappointment. I have heard Lord Eldon jocosely observe, that Lord Thurlow thought a machine might be invented for the drawing of bills. But in this sarcasm, that great judge too much underrated the knowledge, judgment and experience, requisite in the framing of bills in matters of importance. With more truth it has been remarked, "that the mere form " of bringing a question before a court, is of itself a science, an art " less understood and more difficult to learn, than the construction and "use of the most complicated machine, or even the motions of the "heavenly bodies." Maddock, vol. ii. p. 167.]

purposes for which the bill is framed, or the circumstances under which it is exhibited; and those variations will be noticed, together with the peculiarities attending each kind of bill.

[48] pertinence.

Every bill must be signed by counsel (a); and Counsel's signa if it contains matter criminal, impertinent (1), or

> (a) Dillon v. Francis, Dick. 68; French v. Dear, 5 Ves. 547; 2 Ves. & B. 358; Kirkley v. Burton, 5 Madd. 378, note; Webster v. Threlfall, 1 Sim. & Stu. 135; Pitt v. to him, at the time of framing it, good Macklew, 1 Sim. & Stu. 136, note. ground of suit. 3d June, 1826, MSS. Lord Eldon declared that the signa- And see 3 Ves. 501. ture of counsel to a bill is to be re-

garded as a security, that, judging from written instructions laid before him of the case of the defendant as well as of the plaintiff, there appeared

Prolixity.

(1) The setting forth important documents verbatim is not impertinence, but if unnecessary, it may be visited in costs. Lowe v. Williams, 2 S. & S. 574.

Statement show-ing the interest of relators.

Although it is not necessary, in an information that relators should have any interest in the subject of the suit, yet a statement showing the nature of their interest is not impertinent, but is convenient, as, in the event of the information failing, the court is thereby enabled to make the parties pay the costs who are parties beneficially interested in the property. Richards v. The Attorney General, 12 Cl. & Fin. 30.

Unnecessary words.

In Woods v. Woods, 10 Sim. 215, the bill stated that a will in which there were several words mis-spelt, was "in the words and figures hereunder set forth, the inditing and spelling thereof being set forth with the greatest accuracy; and Sir L. Shadwell, V. C., held that this preface was impertinent; and that it would have been sufficient to allege that the testator made his will "as follows:"-

For other cases on this subject, see note to original page [313], infra.

"The word impertinent by the ancient jurisconsults, or law coun-" sellors, who gave their opinions on cases, was used merely in oppo-" sition to pertinent-ratio pertinens is a pertinent reason, that is, a " reason pertaining to the cause in question; and a ratio impertinens. "an impertinent reason, is an argument not pertaining to the subject." D'Israeli's 2d series Curiosities of Lit. vol. il. p. 22.

Impertinences are matters not pertinent or relative to points, which, in the particular stage of the proceedings in which the cause is, can properly come before the court for decision. (Wood v. Mann, 1 Sumner's R. 588, 578.)

scandalous, such matter may be expunged, and the counsel ordered to pay costs to the party aggrieved (b). But nothing relevant is considered as scandalous (c) (1).

(b) Ord. in Ch. Ed. Bea. 165. 194; 6 Madd. 252. Emerson v. Dallison, 1 Ch. Rep. (c) 2 Ves. 24; 15 Ves. 477.

In Hawley v. Wolverton 5 Paige R. 523, 522. On hearing upon exceptions to master's report on exceptions to bill for impertinence, the chancellor held-that in determining whether the allegation or statement in a bill is relevant or pertinent, the bill must be viewed not only as a pleading but as an examination of defendant on oath; (of which see further p. 45, note,) and where any allegation or statement may be material in establishing the general allegations of the bill as pleading or in ascertaining or determining the nature, extent, or kind of relief to which complainant is entitled; or which may legally influence the court on the question of costs, such allegation or statement if admitted by defendant or established by proof, is relevant and cannot be excepted to as impertinent.

A few unnecessary words in a bill do not render it impertinent; as, where the allegation is one which, from its nature cannot be put in issue and proved, as where the separate allegation of one of complainants was, that if he had owned the premises in his own right, he would not have had certain ornamental trees cut down for \$500. In such a case it is not exceptionable unless the irrelevant passage would lead to the introduction of improper evidence by putting facts in issue which are foreign to the cause; or where the irrelevant matter would embarrass the defendant in answering the bill. (Idem. 525, 522.)

(1) Montriou v. Carrick, 6 Jur. 97, V. C. W.

In a bill impeaching the validity of a will on the ground of undue Scandal and im' influence over the testator, exercised by a female who takes under such pertinence. will an allegation that prior to the date of the will she engaged in a criminal connexion with him, and openly cohabited with him as if she had been his wife, is not scandalous or impertinent. Anonymous, 1 My. & C. 78.

So, if in a bill for setting aside a will on the ground of fraud and undue influence practised of the testator by a female, there are allegations and interrogatories founded thereon, relating to her cohabitation with the testator, though a married man, they are not scandalous or impertinent, as they relate to that which may be most material in the chain of evidence of undue influence. Evans v. Owen, 5 Law J. Ch. Rep. (N. S.) 74, M. R.

In a bill against an executor, praying for a receiver and an injunc-

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- 2. Where two or more (d) persons claim (e) the same thing (2) by different or separate interests (f), and another person, not knowing to which of the claimants he ought of right to render a debt or duty (g), or to deliver property in his custody (h),
 - (d) Angel v. Hadden, 15 Ves. 244.
- (e) See 2 Ves. Jr. 107; 15 Ves.
 245; Stevenson v. Anderson, 2 Ves.
 & B. 407; Morgan v. Marsack, 2 Meriv. 107.
- (f) And this may be where the claim of one is by virtue of an alleged legal, and that of the other upon an alleged equitable right,
- Paris v. Gilham, Coop. R. 56; Martinius v. Helmuth, 2 Ves. & B. 412; (2d edit.); Morgan v. Marsack, 2 Meriv. 107.
- (g) 1 Eq. Ca. Abr. 80; 2 Ves. Jr. 310; and see Farebrother v. Prattent, 1 Dan. Exch. R. 64; Farebrother v. Harris, ibid. 68.
 - (h) This will not extend to cases

tion against the receipt of the assets by the executor, on account of his misconduct, it is not scandalous nor impertinent to enter into minute details in order to prove that the executor is a person of drunken, violent, and disorderly habits, and of great poverty: for these details as evidence of conduct, are material to the decree asked; and the court will not limit the number of instances which the plaintiff may adduce for the purpose of strengthing his case. Everet v. Prytherych, 6 Jur. 3. V. C. B.

In the late court for the correction of errors in New-York, on affirming chancellor's order conforming master's report, allowing exceptions for scandal and impertinence, to a petition of stockholders for dissolution of a company, the petition having charged a fraudulent combination between a stock subscriber and the company, implicating a third person and one of the commissioners of stock subscription, it was held that as the act charged in the petition would not work a forfeiture of the corporation, the matter was impertinent, as well as scandalous, and was ordered to be expunged. The court say that the names of individuals not parties to the proceedings in the case, ought not to be introduced in an offensive and discreditable manner in the petition or pleading, unless the matters with which they are thus connected are material and pertinent to the relief prayed for; as they have no opportunity for explanation or vindication from the aspersions cast upon their characters. Ordinarily, even where the matter set forth involving the acts and proceedings of persons not parties to the record, are relevant, it is unnecessary to designate their names, all that can be material or important to spread before the court are the facts. (King & Prime v. Sea Insurance Co. 26 Wendell Rep. 64, 62, et seq.)

(1) Glyn v. Duesbury, 11 Sim. 139.

fears he may be hurt by some of them (i), he may exhibit a bill of interpleader against them (k) (1). of

of bailment where the parties may be compelled to interplead at law. See Langstin v. Boylston, 2 Ves. Jr. 101; 1 Meriv. 405. It may be observed that he must not himself claim any interest in the property; Mitchell v. Hoffman, 2 Paige's Ch. Rep. 199.] Hayne, 2 Sim. & Stu. 63.

(i) 1 Eq. Ca. Ab. 80. [Morris v. Barclay, 2 J. J. Marshall, 375]

(k) 2 Eq. Ca. Ab. 173; Cooper v. Chitty, 1 Burr. 20, and see ib. 37; Prac. Reg. 78; Wy. Ed. [Bedell v.

(1) It is essential to the character of a plaintiff to a bill of inter- Want of interest pleader, that he should have no personal interest. Moore v. Usher, in paintiff in a 7 Sim. 383.

A bill is not sustainable as a bill of interpleader, where it raises a Bill of interpleaquestion between the plaintiff and one of the defendants: as where it der raising a question bealleges that interest on a sum secured by a policy is not due from the tween praintiff insurance company by whom the bill is filed. Bignold v. Audland, 11 Sim. 24.

and defendant.

The complainant must show that he is in the situation of a mere stakeholder, having no personal interest in the controversy between the defendants, and that their respective claims against him are of the same nature or character. He cannot sustain the suit if he is obliged to put his case upon this—that as to some of the defendants he is a wrongdoer. Hence a sheriff who levies on property claimed by a third person, cannot file a bill to compel the judgment creditor and the owner to interplead, instead of bringing the question at law against the sheriff as the wrongdoer. (Shaw v. Coster, 8 Paige's Rep. 344-6. 339.)

Complainant must show he is ignorant of the rights of the respective parties who are called on by him to interplead, or at least that. there is some doubt in point of fact to which claimant, the debt or duty belongs, so as he cannot safely pay or render it to one without risk of being made liable for the same debt or duty to the other. (Ib. 347—8.) [The mere suggestion of a doubt as to who is entitled to money due by the plaintiff is not sufficient. Tobin v. Wilson, 3 J. J. Marshall's Rep. 67.] But the party filing not being a claimant, cannot be supposed to be able to set out the claims as accurately as the claimants themselves might. It is enough to satisfy the court there are opposing claims against which he in equity is entitled to protection, until they are settled so as he can pay with safety. The court is liberal to stakeholders or agents, having no interest in the property-on the principle that they have right to protection, not from being compelled to pay, but from the vexation attending all the suits that may possibly be instituted against them. The bill lies, though the claim of one de-

In this bill he must state his own rights, and their

fendant is at law, and the other of equitable cognizance. (Executors of Lozier v. Adm'rs of Van Sann, 2 Green's Ch. Rep. New Jersey, 329, 330. 325.) S. P. [Richards v. Salter, 6 Johns. Ch. Rep. 445; but see Barclay v. Curtis, 9 Price, 661.]

The principle adopted in Bedell v. Haffman, 2 Paige's Rep. 199, is that the bill should not be filed, where complainant in any other way can be protected from an unjust litigation in which he has no interest. But the Chancellor in the above case of the executors of Lozier, said, the rule he thought, will be found to be too broad, and that the bill has been sustained in many cases on other grounds than those of absolute necessity. To executors (and such are the complainants in this case) the court has always been liberal in extending to them when acting in good faith, counsel, indemnity and protection. [If the complainant has paid over money to one defendant under a claim to which he was bound to submit, this will not exclude him from filing such a bill. Nash v. Smith, 6 Conn. Rep. 421.]

A person taxed in two towns for the same property, which is taxable in one only, but the right as to each town is doubtful, may file bill of interpleader to compel the collectors to settle the right between themselves. (Mohawk and Hudson Rail Road Co. v. Clute, 4 Paige's Rep. 385.) So against two collectors of two counties, in both which complainant had been assessed for the same personal property. (Thompson v. Ebbetts and Welch, 1 Hopk. Ch. Rep. 272.) But complainant in his bill must offer to bring the fund, and it seems in case of tax, the larger tax, into court, and must show he is ignorant of the rights of the claimants, or at least, that there is some doubt which is entitled to the fund, so as he cannot safely pay it to either. "The only ground upon what the court assumes jurisdiction in a simple bill of interpleader, is the danger of injury to the complainant from the doubtful rights and conflicting claims of the several defendants, as between themselves." For this reason he must state his own situation, in reference to the fund in question, or the duty to be performed, and the nature of the claims of the several defendants to the same: and where it appears on the bill that one of them is clearly entitled to the debt or duty claimed, the bill is not sustainable. Where complainant is entitled to equitable relief against the legal owner of the property, if the legal title to it is in dispute between two or more, so as he cannot ascertain to which it belongs, he may file a bill in the nature of a bill of interpleader and for relief, against both of the comp'ainants. An offer to pay to the respective collectors such amount as is properly chargeable to the complainants on account of their real estate, or as the court may direct, would be a very proper offer in a bill for relief, in the nature of a bill of interpleader; but it is not what

several claims; and pray that they may interplead, so that the court may adjudge to whom the thing belongs, and he may be indemnified. If any suits at law are brought against him, he may also pray that the claimants may be restrained from proceeding till the right is determined (l).

As the sole ground on which the jurisdiction of Affidavit in supthe court in this case is supported is the danger of injury to the plaintiff from the doubtful titles of the defendants, the court will not permit the proceeding to be used collusively to give an advantage to either party, nor will it permit the plaintiff to delay the payment of money due from him, by suggesting a doubt to whom it is due; therefore, to a bill of interpleader the plaintiff must annex an affidavit that there is no collusion between him and any of the parties (m); and if any money is due from him he must bring it into court, or at least offer so to do by his bill (n) (1).

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See 1 Jac. R. 205.

is required in a bill filed for the simple purpose of asking the defendants to litigate and settle their conflicting claims between themselves. For these reasons the bill was deemed defective in M. hawk and Hudson R. R Co. v. Clute, 4 Paige's Rep. supra, 391-3. 385.

⁽¹⁾ Prac. Reg. 78; Wy. Ed.; E. B. 410; 1 Jac. R. 205; (8 Paige's I. Comp. v. Edwards, 18 Ves. 376; Ch. Rep. 345.) Croggon v. Symons, 3 Madd. 130;

⁽n) Prac. Reg. 79, Wy. Ed.; Earl of Thanet v. Patteson, 3 Barnard, (m) 2 Eq. Ca. Ab. 173; Errington 247; 2 Ves. Jr. 109; Burnett v. Anv. Att. Gen. Bumb. 303; 2 Ves. & derson, I Meriv. 405; Warington v.

^{(1) (8} Paige's Ch. Rep. 345. 4 ld. 392. 385, see p. 59, note.) general, on a bill of interpleader, the plaintiffs will be allowed their costs out of the fund, but if the money has not been brought into court, they must pay interest upon it. Spring v. S. C. Ins. Co., 8 Wheat. 268.] For further information on this subject, see infra, original pp. [141-143.] [For form of bill, see Willis on Eq. Pl. 303; Eq. Draft. 248. 2d edit.

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Contents there-

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3. Bill for a writ of certiorari.

3. When an equitable right is sued for in an inferior court of equity, and by means of the limited jurisdiction of the court the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior court; the defendant (o) may file a bill in chancery, praying a special writ, called a writ of certiorari, to remove the cause into the court of chancery (p). This species of bill, having no other object than to remove a cause from an inferior court of equity, merely states the proceedings in the inferior court, shows the incompetency of that court, and prays the writ of certiorari. It does not pray that the defendant may answer, or even appear to the bill, and consequently it prays no writ of subpæna (q). The proceedings upon the bill are peculiar, and are particularly mentioned. in the books which treat of the practice of the court (r). It may seem improper to consider certiorari bills under the heads of bills praying relief; but as they always allege some incompetency of the

Proceedings

thereon.

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Wheatstone, 1 Jac. Rep. 202; E. I. Comp. v. Edwards, 18 Ves. 376; and see Statham v. Hall, 1 Turn. R. 30. In some instances it seems, that if an injunction should have been prayed it would not be granted, unless the money should have been actually paid into court, Dungey v. Angove, 3 Bro. C. C. 36. [See 1 Hogan, 118; 1 Sim. 15.] And it may be observed, that where the whole subject matter of the suit is money, and the same has been paid into court, and the cause heard, the suit is at an end, so far as the plaintiff is concerned. See Anon. 1 Vern. 351; 3 Barnard, 250. [A motion to

pay in the money may be grounded on the bill only, 1 Sim. 385.]

- (a) Sowton v. Cutler, 2 Chan. Rep. 108.
- (p) Prac. Reg. 41; Boh. Priv. Lond. 291; *Hilton v. Lawson*, Cary's Rep. 48; 1 Vern. 178.
- (q) There are cases mentioned in the books apparently to the contrary; but they seem not to have been cases of bills praying merely the writ of certiorari. See 1 Ca. in Ch. 31.
- (r) Prac. Reg. 82, Wy. Ed.; Stephenson v. Houlditch, 2 Vern. 491; Woodcraft v. Kinaston, 2 Atk. 317; Pierce v. Thomas, 1 Jac. R. 54; Edwards v. Bowen, 2 Sim. & Stu. 514.

inferior court, or injustice in its proceedings (s), and seek relief against that incompetency or injustice, they seem more properly to come into consideration under this head than under any other. In case the court of chancery removes the cause from the inferior court, the bill exhibited in that court is considered as an original bill in the court of chancery, and is proceeded upon as such.

Original bills not praying relief have been al- praying relief. ready mentioned to be of two kinds: 1, bills to perpetuate the testimony of witnesses; and 2, bills of discovery.

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1. A bill to perpetuate the testimony of witnesses 1. Bills to perpetuate testimomust state the matter touching which the plaintiff contents thereis desirous of giving evidence, and must show that of he has some interest in the subject (t), and pray leave to examine witnesses touching the matter so stated, to the end that their testimony may be preserved and perpetuated (u) (1).

- (s) 1 Vern. 442.
- (t) Mason v. Goodburne, Rep. Temp. Finch. 391; Smith v. Att. Gen. Mich. 1777, in Chanc. As to the nature of the interest which is sufficient whereupon to institute such a suit, see 6 Ves. 260, 261; Lord Dursley v. Fitzhardinge, 6 Ves. 251; don, 2 P. Wms. 162; 2 Ves. 497; Allan v. Allan, 15 Ves. 130.
- 1 Sch. & Lefr. 316. As relief is not son v. Arnold, 19 Ves. 670. prayed by a bill to perpetuate the

testimony of witnesses, Dalton v. Thomson, Dick. 97. [Jerome v. Same, 5 Conn. Rep. 352; Miller v. Sharp, 3 Randolph's Rep. 41]; the suit is terminated by their examination; and of course, therefore, is not brought to a hearing, Hall v. Hoddes-Anon. Ambl. 237; Vaughan v. Fitz-(u) Rose v. Gannel, 3 Atk. 439; gerald, 1 Sch. & Lefr. 316; Morri-

^{(1) [}Jeremy's Eq. Jur. 273; Jerome v. Same, 2 Conn. Rep. 352; May v. Armstrong, 3 J. J. Marshall's Rep. 261. Such a bill must be sworn to. Laight v. Morgan, 1 J. C. 429; S. C. 2 C. C. E. 344. For a form of this affidavit, 2 Madd. Ch. Rep. 252, see a precedent of such a bill in Willis on Pleading, p. 310; and observe the notes and cases there; also a precedent in the Equity Drafts. (2d edit.) p. 465.]

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The bill ought also to show that the facts to which the testimony of the witnesses proposed to be examined is conceived to relate cannot be immediately investigated in a court of law, as in the case of a person in possession without disturbance (x); or that before the facts can be investigated in a court of law the evidence of a material witness is likely to be lost, by his death, or departure from the realm (y) (1). To avoid objection

- (x) See Duke of Dorset v. Girdler, Prec. in Ch. 531; 1 Sim. & Stu. 88.
- (y) According to the latter part of this proposition, the right of action may be either in the plaintiff or defendant in equity. With reference to the defendant the time of bringing the action depending upon his will, the situation of the plaintiff would be similar to that intimated in the former part of the proposition in the text, 1 Sim. & Stu. 89; and with respect to the plaintiff, it must be understood to relate to the case of his not being able at present to sustain an action. Cox v. Colley, Dick. 55; 1 Sim. & Stu. 114; for, if he should have such present right, his object

could only be what is technically termed an examination de bene esse, upon the ground of his having only one witness to a matter on which his claim depends, or, if he have more, on the ground of their being aged, or too ill or infirm to attend in a court of law, and that he is therefore likely to lose their testimony before the time of trial, 1 Sim. & Stu. 90, in which case it seems that it ought to be stated in the bill that the action was brought before the same was filed. Angell v. Angell, 1 Sim. & Stu. 83. On the general subject see the cases cited, I Sim. & Stu. 93, note, and Teale v. Teale, 1 Sim. & Stu. 385.

Bills to perpetuate testimony seem divisible into two kinds; namely, bills to perpetuate testimony, specifically so called, and bills to take testimony de bene esse. For some points as to these, not decided within the period comprised in the present editor's field of labor, the reader is referred to Story's Eq. Pl. §§ 299—310.

The distinction between the two bills according to Mr. Story is,

^{(1) [}Or that such witness is beyond sea; or that the facts to be examined are of great importance, or no other but a single witness, although neither aged nor infirm. (Shirley v. Earl Ferrers, 3 P. Wms. 77; Pearson v. Ward, 1 Cox, 177; Hankin v. Middleditch, 2 Bro. C. C. 640;) or, only two witnesses (Lord Cholmondeley v. Lord Orford, 4 Bro. C. C. 156,) to be examined, is or are privy to such facts whereby the complainant is in danger of losing his or their testimony.]

to a bill framed on the latter ground it seems pro- Affidavit in supper to annex to it an affidavit of the circumstances by which the evidence intended to be perpetuated is in danger of being lost (z); a practice adopted in other cases of bills which have a tendency to change the jurisdiction of a subject from a court of law to a court of equity, and which will be afterwards more particularly noticed. It seems ano- Additional averther requisite to a bill of this kind that it should state that the defendant has, or that he pretends to have, or that he claims, an interest to contest the title of the plaintiff in the subject of the proposed testimony (a).

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4. Every bill is in reality a bill of discovery; but II. Bills of discovery. the species of bill usually distinguished by that title is a bill for discovery of facts resting in the knowledge of the defendant, or of deeds or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery (1),

cumstances is also requisite, where Wms. 77. the object is merely the examination of the witness de bene esse. Angell hardinge, 6 Ves. 251. v. Angell, 1 Sim. & Stu. 83; and

(z) Earl of Suffolk v. Green, 1 see Philips v. Carew, 1 P. Wms. Atk. 450. An affidavit of like cir- 117; Shirley v. Earl Ferrers, 3 P.

(a) See Lord Dursley v. Fitz-

that the former lies where no present suit can be brought at law by the party seeking the aid of the court to try his right; the latter in aid of a suit pending. Story's Eq. Pl. § 303. 307. In New-York, provision by statue exists for taking testimony de bene esse before certain officers, without filing a bill.

(1) The rule to be applied to a bill seeking discovery from an in- The bill. terested party, is, that the complainant shall charge in his bill that the facts are known to the defendant, and ought to be disclosed by him; and that the complainant is unable to prove them by other testimony, And when the facts are desired to assist a court of law in the progress of a cause, it should be affirmatively stated in the bill, that they are

though it may pray the stay of proceedings at law

wanted for such purpose. (Brown v. Swann, 10 Peters, 502. 497. But see note, infra.)

[In order to give jurisdiction, on account of the defect of proof, the fact sought to be discovered must rest exclusively in the defendant's knowledge, and be susceptible of no other proof; and must be so alleged. Emerson v. Staton, 3 Monroe's (Kentucky) Rep. 117.]

If certain facts essential to the merits of a claim purely legal, be exclusively within the knowledge of a party against whom that claim is asserted, he may be required to disclose those facts; and the court being thus in possession of the cause, will proceed to determine the whole matter in controversy. But this rule cannot be abused by being employed as a mere pretext for bringing causes proper for a court of law, into a court of equity. If the answer of defendant discloses nothing, and plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the established rules limiting the jurisdiction of courts require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law. (Russell v. Clark's Ex'rs., 7 Cranch Rep. 69-97; 2 Cond. Rep. 422. 417.)

In the late court of chancery in New-York it was settled, notwithstanding the English decisions, infra, that if a bill contains no prayer in the usual form, either for specific or general relief, it may be considered a bill of discovery merely, although the word decree is erroneously inserted in the prayer for process of subpæna instead of, or after, the word direction; which latter word instead of the former should be inserted in the prayer of process upon a bill of discovery. (Schroeppel v. Redfield, 5 Paige's Ch. Rep. 245; McIntyre v. Trustees of Union College and E. Nott, 6 Id. 242-3. 239.) The prayer for relief usually precedes that for process; and no relief can be granted upon the ordinary conclusion for the prayer for subpoena. It is nothing more than a prayer for such process, and there is very little difference in the effect of the expressions "to abide the further order and direction of the court," or the further order and decree of the court. If the bill, although for discovery, contains a prayer for relief, it is converted into a bill for relief, but the prayer for process does not have that effect. (Id. 5 Paige, 245-8. 1 Edw. V. C. R. 271.)

Bill of discovery ral relief.

A bill which specifically prays a discovery only, but concludes with prayer for gene. a prayer for general relief, is a bill for relief. But liberty will be given to amend by striking out the prayer for general relief. Westcombe, 6 Sim. 30.

> If, in the prayer of process, a bill prays that the defendant may abide such order and decree as the court may think proper to make,

till the discovery should be made. This bill is For what they commonly used in aid of the jurisdiction of some used. other court, as to enable the plaintiff to prosecute or defend an action at law (b) (1), a proceeding

(b) 5 Madd. 18.

the bill is a bill for relief; and if, without such words, the bill would Insertion of be a mere bill of discovery, it will be demurrable as a bill for relief. words applicable to a bill for Ambury v. Jones, 1 Younge, 199; James v. Herriott, 6 Sim. 428.

relief in the prayer of pro-

But the words "abide such order therein," without the word "de-cess. cree," will not have this effect; because the word "order" must be considered as meaning such an order as is consistent with the general scope of the case made by the bill, as a mere bill of discovery. Baker v. Bramah, 7 Sim. 17.

A bill which, besides praying a discovery, prays for a commission Bill for a comto examine witnesses abroad in aid of the plaintiff's defence to an action, and for an injunction to restrain proceedings in the mean time, is not a bill for relief. And therefore a decourage in her of a life in the mean time, is not a bill for relief. And therefore a demurrer in bar of relief to such a bill, without mentioning discovery, is bad. Mills v. Camptell, 2 Y. & C. Eq. Ex. 389.

(1) A defendant at law may file a bill of discovery, whether the Bill of discovery object of it is to sustain a defence to an action, or rebut the evidence to rebut evidence in support of the action. Glascott v. The Governor and Company of of an action. the Copper Miners of England, 11 Sim. 305.

[A bill of discovery for matters material to the defence of the plaintiff in a suit at law against him, must state the nature of that defence. It ought to state enough to enable the court to see that the ends of justice require its interposition; and the facts sought to be discovered should be so far stated as to show their pertinency and relevancy. M'Intyre v. Mancius, 3 J. C. R. 45; S. C. on appeal, 16 J. R. 592; Gelston v. Hoyt, 1 J. C. R. 543; Leggett v. Postley, 2 Paige's Ch. Rep. 599.]

In a late case in New-York it was held, that the bill lies, as a general rule, where discovery is shown to be material in aid of a defence in a suit at law, and it need not aver that complainant cannot otherwise establish his defence at law. The head note of the case of Legget v. Postley, 2 Paige's Rep. 599, contra, is not warranted by the opinion of the court in that respect. It is only necessary to show that the discovery is material to his defence at law, not that it is absolutely necessary; but where he seeks to give jurisdiction to the court of chancery to grant relief upon the ground that a discovery was necessary, and that this court having gained jurisdiction of the

before the king in council (c), or any other legal

(c) 1 Ves. 205.

cause for that purpose, will retain it for the purpose of doing complete justice between the parties, he must not only show that the discovery is material to his defence at law, but must also allege affirmatively that he cannot establish such defence without the aid of the discovery, and in such case if the bill does not show a discovery is necessary as well as material and convenient, defendant may demur to the relief sought by such bill. The defendant must answer and make the discovery, (even in case of libel suit, where it will not criminate himself or subject him to penalty or forfeiture; for if so, it would violate the spirit of the constitution, declaring that no one shall be compelled in any criminal case, to be a witness against himself,) although he demurs to the relief. A similar averment of the necessity of a discovery in aid of his defence, and sworn to, is necessary, where he asks for injunction to stay proceedings there until answer to the bill. He must in a bill of discovery charge, either on information and belief, or otherwise, that the matters of which he seeks a discovery are true in point of fact, but the omission may be supplied by amendment. (March v. Davison, 9 Paige's Ch. Rep. 583-6, &c. 580. See Brown v. Swan, 10 Peters, 502, supra, note. Also, Russell v. Clark's Ex'rs, 7 Cranch, same note; and Story's Eq. Pl. 4th edit., § 319, n. 2.)

After a verdict at law, a party comes too late with a bill for discovery. There must be a clear case of accident, surprise or fraud, before equity will interfere. (Id. 504, Brown v. Swan.)

A mere bill for discovery in aid of a defence of a suit at law, does not concern property, and therefore the amount required (in New-York by statute) to sustain the jurisdiction or "dignity" of the court, (viz. \$100) is immaterial. But by introducing a prayer for relief, complainant makes it a suit "concerning property" within the provisions of the statute, and if the value is less than \$100, the bill must be dismissed with costs. (Idem. 5 Paige, 245—8. Goldey v. Becker, 1 Edw. V. C. R. 271.)

As to the right to file a bill of discovery against a partner of a firm after its dissolution, and the effect of his answer on oath as evidence in aid of a defence to a suit at law, the chancellor, in Woods v. Norton, 5 Paige's Rep. 249, on motion to dissolve injunction, held that such answer would not be evidence; but Mr. Justice Bronson, in the only opinion given on appeal, Norton v. Woods, 22 Wendell Rep. 524, affirming the decision of the chancellor, expresses his dissent from the chancellor, no question being taken however thereon, except the general question of reversal or affirmance of the decree, the point discussed by Judge Bronson as to the right to file a bill of discovery and the effect of such answer, is to be regarded as an open question. (See ibid. 22 Wend. 525, n. 520.) See further, note, infra.

proceeding of a nature merely civil (d) before a jurisdiction which cannot compel a discovery on oath (e); except that the court has in some instances refused to give this aid to the jurisdiction of inferior courts (f) (1). Any person in possession of Filed by a peran estate, as tenant or otherwise, may file a bill son in possession against a against a stranger bringing an ejectment, to dis-plaintiff in ejectment. cover the title under which the ejectment may be brought (g), though the plaintiff may not claim any title beyond that of a mere tenant or occupant (2). A bill of this nature must state the mat- Contents there-

(d) 2 Ves. 398.

(f) 1 Ves. 205.

(e) Dunn v. Coates, 1 Atk. 288; (g) 1 Ves. 249; sed qu. note. 1 Ves. 205; Anon. 2 Ves. 451.

(1) It has never been decided that a discovery will be enforced by Discovery in aid the court of chancery in aid of the defence to a suit in a foreign court. of proceedings in a foreign But, at all events, it will not be enforced where the bill does not state court that the plaintiff cannot have a discovery in the foreign court. Bent v. Young, 9 Sim. 180.

(2) The case of Metcalf v. Harvey, 1 Ves. sen. 249, (cited above,) where Lord Hardwicke appears to have decided that a person in possession of an estate, against whom another had brought ejectment, might bring a bill against the plaintiff in that suit, to compel him to discover his title under which he claimed to oust complainant of the premises, has not been followed in England, and is in conflict with decisions here, and with Adderley v. Sparrow, cited by Lord Redesdale, (225, [190], infra); Chancellor Kent, in Kimberley v. Sells, 3 Johns. Ch. Rep. 467, decided on the special circumstances without intending to endorse Lord Hardwicke. A party to a suit at law cannot be compelled to discover the grounds of his claim therein. The other party must resort to his right at law, for a bill of particulars. But complainant in a bill of discovery must state a case which shows that the discovery sought is material to the prosecution or defence of the suit at law, which he wishes to establish by the defendant's confessions in answer to his bill; otherwise the bill will be regarded as a mere fishing bill. It is not sufficient for complainant to allege that the matters as to which discovery is sought are material to the defence in the suit at law, but he must state his case in such a manner in his bill, that the court can see how they may be material. Hence, where complain-

ter touching which a discovery is sought, the inte-

ant filed bill for discovery in aid of a prosecution at law, or rather to aid him to resist a set-off which defendant in a notice to his plea of general issue had set up, and claiming a discovery of the grounds or particulars of such set-off, without stating a case agreeably to the foregoing principles, that entitle him to the discovery; a demurrer was sustained on appeal: the court holding, that although in a proper case, a discovery in aid of a prosecution, will be compelled in the same manner and extent as if for defence, yet the bill was defective in not stating a case which shows that the discovery sought is material to resist an illegal or inequitable claim of set-off. (Lane v. Stebbins, 9) Paige's Rep. 624-6. 622; citing also 3 Johns. Ch. Rep. 47; 2 Id. 413.)

The court will not aid a landlord to compel discovery from his tenant as to the existence of covenants or conditions in a lease, whereby lessee's estate may have become forfeited. Therefore, where a bill was filed for the purpose of ascertaining whether there might not be something in the original lease, (under which complainant for fortytwo years had received a certain rent, but the original lease he had never seen, but without alleging that he ever believed that a greater rent was reserved or stipulated to be paid,) which would entitle complainant to claim other or greater rights, in relation to the lot, than those he had been exercising for nearly half a century, it was pronounced a fishing bill, and demurrable. (Lansing v. Pine, 4 Paige's Rep. 639.)

If the facts sought to be discovered, could not, if disclosed, be so used as to support or sustain any title or interest of the complainant, or enable him to sustain any action for any vested interest, the bill cannot be sustained. As where, in Massachusetts, the bill charged a fraud on part of defendant acting as deputy sheriff, and in his own natural capacity; but the plaintiff did not show sufficient direct interest in the subject matter to entitle him to discovery, the court held that over a direct charge of fraud they had no jurisdiction in equity, and that though a fraud incidentally drawn in question, the court having otherwise jurisdiction would inquire and decide, yet the bill as a bill of discovery, was not sustainable for the reasons given. (Fiske v. Slack, 21 Pick. Rep. 366. 361; Holland v. Cruft, 20 Id. 321.)

Bill of discovery against a per-

A bill of discovery in aid of a defence to an action cannot be sustained against a person who is not a party to the record at law, alson not a party tanieu against a person and sonly the agent of such person, and has to the record in though the plaintiff at law is only the agent of such person, and has brought the action on his behalf.

> And hence, where an action is brought by the agent of a foreign sovereign on bills of exchange, the acceptors thereof cannot make the sovereign a party to a bill of discovery in aid of their defence to such

rest of the plaintiff and defendant in the subject,

The Queen of Portugal v. Glyn, 7 Cl. & Fin. 466. And upon action. the same principle where an action is brought against underwriters on a policy of insurance, they cannot make a person not a party to the record at law, a party to a bill of discovery against the plaintiff at law; though they allege that the policy was effected by the plaintiff at law as agent for such other person. Such a practice might be made an engine for the oppression of persons alleged to be interested, but in reality not interested in the action; and where such persons are also out of the jurisdiction, it might also be made a means of delaying and defeating the plaintiff at law. Kerr v. Rew, 9 Law J. (N. S.) 148, L. C.

A bill of discovery cannot be filed against one who is apparently a Discovery not mere witness, and not a real party in interest. For such discovery against nominal could not be evidence for another in a suit at law. But under the Usury-New-York usury act, May, 1837, a remedy at law is given, as the real as well as nominal plaintiff in record may be examined. Where, however, defendants at law had been tricked out of their defence, a bill for discovery and relief is sustainable on ground that they were deceived and defrauded out of such defence. (Post and another v. Boardman, 10 Paige's Rep. 580.)

Where two are sued at law on a joint contract, on a demand said to be usurious, but within the knowledge of one of the defendants, the other cannot file a bill for relief to make his co-defendant a witness merely to establish the usury. But where the defence is personal as to one, and can only be established by the testimony of his co-defendant, he may file a bill for relief to obtain his testimony. (Savage v. Todd, 9 Paige's Rep. 578.)

Formerly by the usury law in New-York, the usurious contract was absolutely void. If the borrower could prove the usury, it was a complete defence at law. If he could not, and was compelled to invoke the aid of equity, by a bill of discovery against the lender, calling on him to admit or deny the usury, he was met by the cardinal maxim of that court, that "he who asks for equity must do equity," and therefore neither discovery nor relief could be obtained, without a repayment of the sum actually lent with lawful interest, and an offer to that effect must have been made in the bill, or it was demurrable. The court guarded that principle, where the bill was for discovery merely, by the additional principle that equity will not compel a defendant to answer on oath, and thus become a witness for his adversary against himself, where his answer may subject him to a criminal proceeding, penalty, forfeiture, or loss in the nature of forfeiture. In such case therefore, the borrower was bound to waive the forfeiture and pay the actual loan, not only because it was just and equitable, but to guard

and the right of the first to require the discovery from the other (h).

Bills of discovery of documents praying relief founded on them. A bill seeking a discovery of deeds or writings sometimes prays a relief, founded on the deeds or writings of which the discovery is sought. If the relief so prayed be such as might be obtained at law, if the deeds or writings were in the custody

(h) Cardale v. Watkins, 5 Madd. Dick. 652; S. C. 1 Bro. C. C. 468. 18; and see Moodaly v. Moreton, [Jeremy's Eq. Juris. 257.]

against the possibility of defendants answer being the means of subjecting him to a forfeiture. In some cases, such as bonds with warrants to confess judgment, and mortgages with power to foreclose by advertisement at law, the holder, from the nature of his security, need not go to a court of law or equity to enforce them. The borrower in such cases, (although he could prove the usury without resorting to the oath of the lender,) had no opportunity of setting it up, or availing himself of it at law, and therefore, in such case also, where he was compelled to file his bill and ask relief in equity, although he required no discovery, the court would not relieve him from the usurious excess, excepting on the equitable condition of repaying the sum actually loaned. The Revised Statutes (New-York) changed the law and circumscribed the original power and authority of the court to impose the above terms as condition of discovery or relief, or both, by exempting a bona fide holder from the operation of the act: by dispensing with the necessity on part of borrower on bill of discovery of paying or offering to pay any interest whatever on the sum or thing loaned; and by a judicial interpretation of the act in the court of errors, that in the cases above enumerated, where the security was of such nature as to preclude the borrower from recourse in the first instance to law or equity, as on bond and warrant, or mortgage as mentioned, even where he could prove the usury, and where relief only is asked without any discovery from the lender, it shall be granted without requiring the payment of the money loaned. It was but abrogating a particular rule of the court, to give effect to and defeating any evasion of the law for the prevention of usury. By consequence on bill for discovery, the court still requires payment or offer in the bill to pay the principal sum (without interest); so also on bill for discovery and relief; but on bill for relief only, in such cases as those suggested, the statute operates in full vigor. (Livingston v. Harris, in error, 11 Wend. 329, on affirmance of S. C. 3 Paige's Rep. 528.)

of the plaintiff, he must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant (i); but a bill for a discovery merely, or which only prays the delivery of deeds or writings, or equitable relief grounded upon them, does not require such an affidavit (k) (1).

If the title to the possession of the deeds and where a prewritings of which the plaintiff prays possession depends on the validity of his title to the property to which they relate, and he is not in possession of that property, and the evidence of his title to it is in his own power, or does not depend on the production of the deeds or writings of which he prays the delivery, he must establish his title to the property at law before he can come into a court of equity for delivery of the deeds or writings (l).

law is necessary.

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II. Bills not original are either an addition to II. Bills not original. or a continuance of an original bill, or both. An

(i) 1 Ves. 344; Hook v. Dorman, 1 Sim. & Stu. 227. [Executors of Livingston v. Livingston, 4 Johns. Ch. Rep. 294. See form of affidavit, 1 Grant's Pr. 2d edit. 13.] [See form of bill, Willis, 13. 27; and further on this species of bill, p. 185, post.] *

(k) Godfrey v. Turner, 1 Vern.

247; Whithurch v. Golding, 2 P. Wms. 541; 1 Ves. 344; 3 Atk. 132. But see Aston v. Lord Exeter, 6 Ves. 288.

(l) See Jones v. Jones, 3 Meriv. 161; 1 Madd. Rep. 193; Crow v. Tyrrell, 3 Madd. 179; Field v. Beaumont, 1 Swanst. 204.

⁽¹⁾ The reason of this distinction is, that in the first mentioned case where an affidavit is required, the plaintiff seeks to change the tribunal, by substituting the proceedings of a court of equity for the less tedious and less expensive procedure of a court of law.

It seems a party has no right to the production of deeds which relate alone to the adversary's title. He shall have discovery of so much as relates to his own, but not pry into that of defendant. But when defendant complies with the prayer for inspection of the deed, without opposition, no difficulty exists on that part of the case. (Thompson v. Eagle et al., 3 Green's Ch. Rep. (N. J.) 275-6. 271.)

for a bill of this kind.

When an amend-imperfection in the frame of a bill may generally mitted, and there is occasion be remedied by amendment; but the imperfection may remain undiscovered whilst the proceedings are in such a state that an amendment can be permitted according to the practice of the court (1).

After replication, the plaintiff will not be allowed to amend his bill until after he has obtained leave to withdraw his replication; and the materiality of the amendment, and the reason why it was not stated before, must be satisfactorily shown to the court. [See cases attached to the text.] But if a witness has been examined, the pleadings cannot

^{(1) [}Amendments are granted only where there is some defect as to parties, or some omission or mistake of a fact or circumstance connected with the substance of the case, but not forming the substance itself, or where there is some defect in the prayer for relief. Lyon v. Tallmage, 1 J. C. R. 184; Verplanck v. Mercantile Ins. Co. of N. Y., I Edwards' V. C. Reports, 46. See when amendments are allowed in the court of chancery of the State of New-York, Rules 43, 44, 45. 60; 2 R. S. 184; Hunt v. Holland, 3 Paige's C. R. 78. But the ordinary rules do not apply to sworn bills. Parker v. Grant, 1 J. C. R. 434; Rodgers v. Rodgers, 1 Paige's C. R. 424; Whitmarsh v. Campbell, 2 Ib. 67; and see Beekman v. Waters, 3 J. C. R. 410; and Renwick v. Wilson, 6 Ib. 81. When a complainant wants to amend a sworn bill, he must state the proposed amendments distinctly, so that the court can see that they are merely in addition to the original bill, and not inconsistent therewith. He must also swear to the truth of the several matters proposed to be inserted as amendments, and render a valid excuse for not incorporating them in the original bill; and the application to amend must be made as soon as the necessity of such amendment is discovered. Rodgers v. Rodgers, supra; Whitmarsh v. Campbell, supra; Verplanck v. Mercantile Ins. Co. of N. Y. supra. Amendments to a bill are always considered as forming part of the original bill. 'They refer to the time of filing the bill; and the defendant cannot be required to answer any thing which has arisen since that time. Hart v. Everett, 1 Paige's C. R. 124. Consequently, an original bill cannot be amended by incorporating therein any thing which arose subsequent to the commencement of the suit. This should be stated in a supplemental bill. Stafford v. Howlett, Ib. 200. If the cause has progressed so far that an amendment cannot be made, the court will give the complainant leave to file a supplemental bill. where súch leave is given, the court will permit other matters to be introduced in the supplemental bill, which might have been incorporated in the original bill by way of amendment. Ib.

SEVERAL KINDS OF BILLS.

This is particularly the case where, after the court has decided upon the suit as framed, it appears necessary to bring some other matter before the court to obtain the full effect of the decision; or, before a decision has been obtained, but after the parties are at issue upon the points in the original bill, and witnesses have been examined (in which case the practice of the court will not generally permit an amendment of the original bill) (m),

(m) See Chap. 4. An amend- Sim. & Stu. 40; or to correct a mere ment for the purpose of adding par- clerical error, Att. Gen. v. Newcombe, ties, Anon. 2 Atk. 15; 3 Atk. 111. 14 Ves. 1, will be allowed at the 371, and Palk v. Lord Clinton, 12 hearing of the cause. In the case Ves. 48; Daws v. Benn, 1 Jac. & of an infant complainant, this liberty W. 513; Wellbeloved v. Jones, 1 it seems would be granted without

be altered or amended, unless under very special circumstances, or in consequence of some subsequent event except, for the purpose merely of adding parties. Thorn v. Germond, 4 J. C. R. 363. After publication passed, and the case is set down for hearing, the plaintiff will not be allowed to amend his bill, by adding new charges; but he may file a supplemental bill on payment of costs. Shepherd v. Merrill, 3 J. C. R. 423; and see page 62, ante, and notes there. A second amendment to a bill was refused, after an answer by one defendant, and a plea by another, who was surety, and the plea allowed and the bill as to him dismissed, and a motion for rehearing granted, after eighteen months had elapsed from the first amendment, and no new evidence since acquired; and the second amendment being substantially the same as the first, though more directly charging the defendants with fraud. Kirby v. Thompson, 6 J. C. R. 79.

Amendments by merely adding parties have been allowed at almost every stage of a cause. See amendments of a formal part allowed after a demurrer. M'Ilvaine v. Willis, 3 Paige's C. R. 505.

A complainant cannot, as of course, amend his answer by leaving out the name of defendant. Chase v. Dunham, 1 Paige's C. R. 572. Nor can one defendant be struck out on motion of another, without notice. Livingston v. Ogden, 4 J. C. R. 94.

As to office practice and service upon amendments, see Luce v. Graham, 4 J. C. R. 170; Beekman v. Waters, 3 Ib. 410; Renwick v. Wilson, 6 lb. 81; Bennington Iron Co. v. Campbell, 2 Paige's C. R. 159; Hunt v. Holland, supra.; Rules 43, 44, 45. 60, of New-York Chancery.]

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some other point appears necessary to be made, or some additional discovery is found requisite (n). And though a suit is perfect in its institution, it may by some event subsequent, to the filing of the original bill become defective, so that no proceeding can be had, either as to the whole, or as to some part, with effect; or it may become abated, so that there can be no proceeding at all, either as to the whole, or as to a part of the bill. The first in the case when, although the parties to the suit may remain before the court, some event subsequent to the institution of the suit has either made such a change in the interests of those parties, or given to some other person such an interest in the matters in litigation that the proceedings, as they stand, cannot have their full effect. The other is the case when, by some subsequent event, there is no person before the court by whom, or against whom, the suit, in the whole or in part, can be prosecuted.

69 [57] It is not very accurately ascertained in the books of practice, or in the reports, in what cases a suit becomes defective without being absolutely abated; and in what case it abates as well as becomes de-

restriction, if for his benefit, Pritchard v. Quinchant, Ambl. 147; and even in ordinary cases great indulgence has in this respect been shown. See Filkin v. Hill, 4 Bro. P. C. 640; Toml. Ed.; Palk v. Lord Clinton, 12 Ves. 48; Woollands v. Crowcher, 12 Ves. 174; Hamilton v. Houghton, 2 Bligh. P. C. 169. And with regard to the practice before the hearing, it may be observed, that after the cause is at issue this court will not give the plaintiff leave to amend, unless he shows not only the materiality of the

proposed alteration, but also that he was not in a condition to have made it earlier. See Longman v. Calliford, 3 Anstr. 807; Forrest, Exch. Rep. 13; Lord Kilcourcy v. Ley, 4 Madd.212; Dean of Christchurch v. Simonds, 2 Meriv. 467; Wright v. Howard, 6 Madd. 106; M. Neill v. Cahill, 2 Bligh, P. C. 228. See Barnett v. Noble, 1 Jac. & W. 227.

(n) See Jones v. Jones, 3 Atk. 110; Goodwin v. Goodwin, 3 Atk. 370

fective. But upon the whole it may be collected (o), that if by any means any interest of a party where proceed-ings become de-to the suit in the matter in litigation becomes vested transfer of an in another, the proceedings are rendered defective in proportion as that interest effects the suit; so that although the parties to the suit may remain as before, yet the end of the suit cannot be obtained (p) (1). And if such a change of interest is where they become abstral by occasioned by, or is the consequence of, the death $\frac{1}{p}$ the death or marriage of the of a party whose interest is not determined by his death, or the marriage of a female plaintiff, the proceedings become likewise abated or discontinued, either in part or in the whole (2). For as far as

(o) It is impossible to give authorihead. The books, in words, almost as frequently contradict as support these assertions. But it is conceived, that from an attentive perusal of the

cases it will be found, that, in geneties for every thing asserted upon this ral, the grounds of the decisions warrant the conclusions here drawn.

> (p) As an example, see Mole v Smith, 1 Jac. & W. 665.

⁽¹⁾ Where the interests of new parties intervene pendente lite, having derivative titles under plaintiff, the suit may abate or become defective, though it would or might be different in case of derivative titles under the defendant pendente lite. But the nature of an abatement in equity, is not necessarily a destruction of the suit as at law, where judgment quod cassetur is entered, but merely an interruption of the suit, suspending proceedings until the new parties are brought in, and if not done in proper time, the court will dismiss the suit. But in any case of a purchase or transfer of interest, pendente lite, the proper parties may be brought before the court, and the cause be permitted to stand over, to allow a supplemental bill to be filed by or against the purchasers. The general rule is that all persons in interest must be made parties. But the omission is not necessary cause of abatement of the suit. That can arise only from matters subsequent to the bill. It may be ground at hearing for a dismission of the bill without prejudice, for want of proper parties, or for an order that bill stand over to make new parties, with leave to file a supplemental Hoxie v. Carr et al., 1 Sumner's Rep. 177-9. 173.

^{(2) [}Where a party who has not been served with a subpæna, nor appeared, dies, his death is no abatement of the suit, and, consequently,

the interest of a party dying extends, there is no longer any person before the court by whom or against whom the suit can be prosecuted; and a married woman is incapable by herself of prosecuting a suit. As the interest of a plaintiff generally extends to the whole suit, therefore, in general, upon the death of a plaintiff, or marriage of a female plaintiff, all proceedings become abated (q)(1).

(q) 1 Eq. Ca. Ab. 1, margin; Dick. 8; Adamson v. Hull, 1 Sim. & Stu. 249.

there can be no revivor. Nor can a plaintiff have the benefit of the proceedings in the suit against the executor or administrator of the deceased; for the intestate was never an effective party to the suit, nor bound by the proceedings. A bill, under these circumstances, is, strictly speaking, original as to the executor or administrator, though supplemental as to the other parties, and would require the representative of the deceased to answer the original bill as well as the supplemental matter, and pray the distinct relief to which the plaintiff considered himself to be entitled against such executor or administrator. Such a bill would fail, if a general demurrer were put in by the representative: upon the ground that the plaintiff was not entitled to revive the suit, nor to have any benefit of the proceedings against him. Asbee v. Shipley, Geldart & Madd. 296.]

The suit abates even after decree, by marriage of a female complainant, and must be revived in favor of, or against her husband, before further proceedings can be had, except to set aside the irregular proceedings had, interim, in master's office. But decree of court of errors affirming decree of chancery, after marriage of female complainant, must be carried into effect here, after the proper parties are brought in. But the marriage of a female defendant, pending suit, does not abate it. There an order is all that is necessary, that the suit proceed · against her, by her new name in connexion with that of her husband. (See pp. 83, note, 84, note, infra.) When suit continues in name of female complainant after marriage, without her husband being made party, she will not be bound by the decision in the cause, if adverse to her interest: although defendant would be bound by a decree in her favor, and could not after, urge the objection that the suit had abated by her marriage. (Quackenbush v. Leonard, 10 Paige's Ch. Rep. 133-4. 131.)

(1) [But an injunction is neither inoperative nor abated by the abatement of a suit. But the rule is, that if the suit abates by the

Upon the death of a defendant, likewise, all pro- or by the death of a defendant. ceedings abate as to that defendant. But upon the [58] marriage of a female defendant the proceedings not abate; do not abate (r), though her husband ought to be named in the subsequent proceedings (s) (1). the interest of a party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest,

If as where the in-

- Vern. 318.
- (s) 1 Ves. 182. The reason of the difference between the cases of a female plaintiff and defendant seems to be, that a plaintiff seeking to obtain a right, the defendant may be injured by answering to one who is not entitled to sue for it; but a defendant merely justifying a possession, the plaintiff cannot be injured by a decree against the person holding that possession. And it has been determined, that where a female plaintiff has married, and has, not-

(r) 4 Vin. Ab. 147; Pl. 20; 1 withstanding, proceeded in a suit as a feme sole, the mere want of a bill of revivor is not error for which a decree can be reversed upon a bill of review brought by the defendant. Lady Cramborne v. Dalmahoy, 1 Chan. Rep. 231; Nels. Rep. 86. "And at law, if a woman sues or be sued as sole, and judgment is against her as such, though she was covert, she shall be estopped, and the sheriff shall take advantage of the estoppel." 1 Salk. 310; 1 Rel. Ab. 869, 1. 50.

death of either of the complainant or defendant, the party against whom the injunction issued, or his representatives, may have an order requiring the complainant or his representatives to revive within a stated time, or that the injunction be dissolved. Where a suit abates by the death of the complainant, those who succeed to his rights may apply to the court to punish a breach of an injunction which has taken place either before or after his death, as soon as they have taken the preliminary steps to revive the suit either by filing a bill of revivor or otherwise; and it is not necessary for them to wait until a decree of revivor is actually obtained. Hawley and others, Trustees, &c. v. Bennett, Paige's Ch. Rep. 163.]

If on death of husband of a female plaintiff suing in her right, the widow do not choose to proceed, the bill abates, and she is not liable for costs. See on this, Story Eq. Pl. § 361, n. 1; the comment on this subject in Cooper Eq. Pl. 66-67, there quoted, and Grant v. Van Schoonhoven, 9 Paige's Rep. 255.

(1) [And if she has answered, the husband is bound by it. 1 Harr. Prac. 296, (6th edit.); and see Cary, 81.]

which happens in the case of a tenant for life, or a person having a temporary or contingent interest, or an interest defeasible upon a contingency, the suit does not so abate as to require any proceeding to warrant the prosecution of the suit against the remaining parties; but if the party dying be the only plaintiff, or only defendant, there may be necessarily an end of the suit, no subject of litigation vives, as in the case of the death of a co-trustee remaining. If the whole interest of a party dying or of the hus-band of a female plaintiff, or of survives to another party, so that no claim can be persons suing on made by or against the representatives of the party dying, as, if a bill is filed by or against trustees or executors, and one dies not having possessed any of the property in question, or done any act relating to it which may be questioned in the suit, or by or against husband and wife, in right of the wife, and the husband dies under circumstances which admit of no demand by or against his representatives (t), the proceedings do not abate. So if a surviving party can sustain the suit, as in the case (u) of several creditors (3), plaintiffs on be-

behalf of them-selves and oth-[59] 71

or where it sur-

(t) Dr. Parry v. Juxon, 3 Chan. v. Briggs, 2 Vern. 249; Anon. 3 Atkyns, 726. See Humphreys v. Hollis, 1 Jac. R. 73. (1)

(u) As another example of the Rep. 40; 2 Freem. 133; Shelberry proposition in the text, the case of a suit by joint-tenants generally, may be mentioned, (2) See 11 Ves. 309; 1 Meriv. 364.

^{(1) [}M'Dowl v. Charles, 6 J. C. R. 132; and see 2 R. S. 184, 185; Vaughan v. Wilson, 4 Hen. & Munf. 453; Coppin v. ____, 2 P. Wms. 496; Bond v. Simmons, 3 Atk. 21. But if she dies, it will abate. The death of the wife, when they sue for what they have a joint right to, shall not abate the suit; for the whole interest survives to the husband. Piers v. Kawse, Cary, 88, 169; Shelberry v. Briggs, 2 Vern. 249; and see Dowlin v. M'Dougall, 1 S. & S. 367.]

^{(2) [}If two joint tenants exhibit their bill and one releases, this will not abate the suit as to the other. 2 Freem. 6.]

^{(3) [}And see Edwards on Parties, 169, pl. 75. A creditor who has been permitted to come in, may revive in cases where the suit abates. Pitt v. Creditors of D. of Richmond, 1 Eq. Ca. Abr. pl. 7.]

half of themselves and other creditors (x). For the persons remaining before the court, in all these cases, either have in them the whole interest in the matter in litigation, or at least are competent to call upon the court for its decree. If, indeed, upon the death of a husband of a female plaintiff suing in her right, the widow does not proceed in the cause, the bill is considered as abated, and she is not liable to the costs (y). But if she thinks proper to proceed with the cause, she may do so without a bill of revivor; for she alone has the whole interest, and the husband was a party in her right, and therefore the whole advantage of the proceedings survives to her; so that if any judgment has been obtained, even for costs, she will be entitled to the benefit of it (z). But if she takes any step in the suit after her husband's death she makes herself liable to the costs from the beginning. If a female plaintiff marries pending a suit, and afterwards, before revivor, her husband dies (a), a bill of revivor becomes unnecessary, her incapacity to prosecute the suit being removed; but the subsequent proceedings ought to be in the name and with the description which she has acquired by the marriage. A decree on a bill of interpleader may or where the plaintiff in an interminate the suit as to the plaintiff, though the terpleading suit litigation may continue between the defendants by interpleader (b); and in that case the cause may

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gan, 1 Sim. & Stu. 358; 1 Sim. & 496. Stu. 494, 495.

⁽y) Treat. on Star Chamb. p. 3, Ferrers, 1772.

sect. 3; Harl. MSS.

⁽x) 1 Meriv. 364; Burney v. Mor- (z) Coppin v. --, 2 P. Wms.

⁽a) Godkin and others v. Earl

⁽b) See above, p. 60, note (n).

proceed without revivor (c), notwithstanding the death of the plaintiff (d) (1).

There is the same want of accuracy in the books in ascertaining the manner in which the benefit of a suit may be obtained after it has become defective, or abated by an event subsequent to its institution, as there is in the distinction between the

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(c) Anon. 1 Vern. 351.

(d) Where on a bill filed by a 473; S. C. 3 Swanst. 132. corporate capacity only, the names of the persons forming the same had been inadvertently and unnecessarily inserted, the members of the corporabill was not considered as operating the benefit of it in a different form. to abate the suit, 3 Swanst. 138: and

see Blackburn v. Jepson, 17 Ves. corporation aggregate, suing in their where a bill is filed by a corporation sole, having a personal interest, the suit necessarily abates by his death, so far as it affects his personal interest, and to that extent may be retion having had individually no inter- vived by his personal representative; est in the subject, the death of a and if the suit affect the rights of his person so improperly named in the - successor, such successor may obtain

(1) [If a mortgagor brings a bill to redeem, after an account is decreed, report made, and divers proceedings are had in the cause, and the plaintiff is ordered to pay costs and deliver possession, and also afterwards the defendant, a mortgagee, dies, his executors may revive the suit and have the benefit of the order for costs. This was decided in Stowell v. Cole, 2 Vern. 396. But see the particulars of the case, for they were, in some respects, special. The heir of a party may revive. 1 Harr. P. 299, (6th edit.) Although by the death of the cestui que trust the suit abates as to him, yet, if there be a decree against him and his trustees to convey, &c., the frustees are obliged to convey, for the death of either party makes an abatement only quoad himself. Ib. 297. Where there is a decree for an account, and then the cause abates by the defendant's death, the general practice allows the representative to revive, as well as the plaintiff, both being in the nature of plaintiffs. Kent v. Kent, Prec. in Ch. 197.

When the contest relates to real estate and is between joint heirs, and one dies without issue or will, leaving the others his heirs, no revivor is necessary. It is otherwise in cases of personalty, which passes to representatives. Shields v. Craig's Ex'rs, 6 Monroe's Rep. 743.]

Bill for discovery merely cannot be revived after answer and discovery. The object is obtained and plaintiff has no motive for reviving it. Hosburgh v. Baker, 1 Peters, 236.

cases where a suit becomes defective merely, and where it likewise abates. It seems, however, clear, that if any property, or right in litigation, vested in a plaintiff, is transmitted to another, the person to whom it is transmitted is entitled to supply the defects of the suit, if become defective merely, and to continue it or at least to have the benefit of it, if abated (1). It seems also clear, that if any pro-By whom the defect or abateperty or right, before vested in a defendant, be-ment may be remedied. comes transmitted to another, the plaintiff is entitled to render the suit perfect, if become defective, or to continue it, if abated against the person to whom that property or right is transmitted.

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The means of supplying the defects of a suit, By what bills. continuing it if abated, or obtaining the benefit of it, are, 1, by supplemental bill; 2, by bill of revivor; 3, by bill of revivor and supplement; 4, by original bill in the nature of a bill of revivor; and 5, by original bill in the nature of supplemental bill. The distinctions between the cases in which a suit may be added to, or continued, or the benefit of it obtained, by these several means, seem to be the following:

1. Where the imperfection of a suit arises from Supplemental hills a defect in the original bill (2), or in some of the

^{(1) [}Deas v. Thorne, 3 Johns. Rep. 543.]

⁽²⁾ A defect in a suit for a specific performance of a purchase con- Supplying a detract is not supplied by a supplemental bill in a subsequent suit, in- nal suit. stituted before a decree in such subsequent suit, by a person claiming to be entitled to the purchase money. Cattell v. Corrall, 1 Hare, 216.

If a person files two bills in succession, in different characters, against If a person files two bills in succession, in different characters, against with a prior bill, the same party, and the statements in the subsequent bill are inconsiscessary it is to be tent with the statements in the prior bill, they will be both dismissed considered supalthough in the subsequent bill the principal inconsistent statement in plemental. the prior bill is alleged to be erroneous, and although there is a prayer,

Bill inconsistent

Objects thereof, and time for filing the same.

proceedings upon it, and not from any event subsequent to the institution of the suit (1), it may be added to by a supplemental bill merely (e) (2).

(e) As a general rule, it has been laid down, that events which have happened subsequently to the filing of the original bill ought not to be made the subject of amendment, but that they should be brought before the court by a supplemental bill. Humphreys v. Humphreys, 3 P. Wms. 349; Brown v. Higden, 1 Atk. 291; 3 Atk. 217;

Pilkington v. Wignell, 2 Madd. R. 240; Usborne v. Baker, 2 Madd. R. 379. (2) See a very peculiar case on this subject, in which the plaintiff, upon facts stated in the answer of the defendant, amended his bill in order to meet the defence which arose therefrom. Knight v. Matthews, 1 Madd. R. 566.

that such subsequent bill may, if necessary, be considered supplemental to the prior suit. Blackburn v. Staniland, 9 Jur. 1027.

(1) Where there is a transfer of interest pending suit, a supplemental bill may be filed against the purchaser. (Hoxie v. Car et al., 1 Sumner's Rep. 178. 173. See further, p. 69, note, supra.)

Supplemental' bill in respect of matters occurred since the filing of the original bill.

Where an original bill is filed for a dissolution of a partnership on the ground of misconduct, other acts of misconduct occurred subsequently to the filing of the original bill should be made the subject of a supplemental bill. And where new matter which occurred subsequently to the filing of the original bill is introduced by amendment, this objection may be taken by the defendant even in his answer, if he insists on the same advantage as if he had demurred or pleaded thereto. Wray v. Hutchinson, 2 M. & K. 235.

Supplemental bill against the personal representative of a defendant who died without having appeared.

When one of the defendants to an original bill dies without having appeared to it, the proper course is to bring his personal representative before the court by a supplemental bill; and if there are no new facts, except the fact of his death, to be brought before the court, and his death does not alter the interest of any of the other defendants, it is not necessary to make them parties to such bill. Collins v. Collins, 6 Jur. 49, V. C. E.

(2) [Sunders v. Frost, 5 Pick. Rep. 275; Barfield v. Kelly, 4 Russ. 355; King v. Sullock, 2 Sim. 469; Candler v. Pettit, 1 Paige's Ch. Rep. 168.]

Supplemental bill.

A strictly supplemental bill is always founded on facts that occur since the filing of the bill. These may be necessary to aid complainant in obtaining the relief sought, or new or additional relief. It is laid down as a rule in Candler v. Pettit, 1 Paige's Ch. Rep. 169, if the original bill entitles complainant to one kind of relief, and the facts subsequently occur to entitle him to other or more extensive relief, he may have such relief by setting out the new matter in the form of a sup-

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Thus a supplemental bill may be filed to obtain a

plemental bill. It may be, this principle is stated too broadly. But the court will not permit a party to file two original bills, and carry on two suits for the same debt; (Eager v. Price, 2 Paige's Rep. 333.) The expense of an original is much greater than a supplemental bill, and the latter should be used when it can equally subserve the purposes of justice. Hence a mortgagee, who filed an injunction bill to stay waste, may by supplemental bill, after debt falls due, pray the additional relief of a foreclosure and sale of the mortgaged premises.

If a bill be entirely defective, a supplemental bill founded on subsequent facts, cannot aid it. But if there is any ground to sustain it even for temporary relief, the court having possession of the cause may retain it for the more general and important purposes of the bill, and allow a supplemental bill to be fied. (Edgar v. Cleverger, 2 Green's (New Jersey) Ch. Rep. 261—2. 258.) And see cases supra, 1 Paige's Rep. 200. 168, and p. 76, note, infra.

(Allen v. Taylor et al., 2 Green's Ch. Rep. (New Jersey,) 436-7, 435.)

[Where much expense has been incurred in the suit, and it appears defective in the form at the hearing, the court will direct the cause to stand over, with liberty to file a supplemental bill to correct the form. Mutter v. Chauvel, 5 Russ. 42.]

So, if on hearing, it appear that the proper parties are not in, complainant may be permitted to file a supplemental bill to bring before the court the necessary parties; as, on bill by heirs at law against executors, for account and distribution, to ascertain, contribute, and pay legacies, &c., complainants may have the proper parties before the court to enable them to have an account of all the legacies which are still a charge on the real estate, and will be permitted to file such bill; or, they may take a reference to take such account on procuring the written agreement or consent of the personal representatives of the deceased egatees to come in be ore the master and litigate their claims, and to be bound by such decree as may be made in the cause, in the same manner as if they were originally made parties. (Jenkins v. Freyer, 4 Paige's Rep. 52, 47.) See further to parties, note, infra.

A supplemental bill cannot be filed to an original bill, on which no subpænas have been served. (Stewart v. Nichols, Tamlyn, 307.)

It is filed on leave. But the irregularity of filing it without, will be deemed waived; it has been held, by voluntary appearance and demurrer. (All nv. Taylor, 2 Green's Ch. Rep. (New Jersey) 437, 435.)

But in Pedrick v. White et al., 1 Metcalf's Rep. (Mass.) 76—9, on demurrer to supplemental bill filed of course, after issue, proofs and publication, the court say, that it must be filed by leave of the court on sufficient cause shown; that the filing it after cause at issue and publication of evidence passed, might lead to great delay and

further discovery (f) from a defendant, to put a new matter in issue, or to add parties, where the proceedings are in such a state that the original bill cannot be amended for the purpose (g)(1). And

(f) Boeve v. Skipwith, 2 Ch. Rep. 142; Usborne v. Baker, 2 Madd. R. 379.

(g) Goodwin v. Goodwin, 3 Atk. 370. There is the form of a bill of this nature in 1 Pres. Prac. of Chan. 146.

abuse, and operate as a means of evading many of the salutary rules, requiring parties to set forth their full grounds, and procure all the evidence they respectively rely upon before publication. In order to lay the foundation for filing it, it ought to be shown to the satisfaction of the court, either, 1. That the matter relied on as supplemental, has arisen since the commencement of the original suit; or 2. That the facts relied on have first come to plaintiff's knowledge, or have been made known to him in such a manner that he could avail himself of them, since the cause has passed the stage in which he might have had leave to amend; or 3. That the plaintiff has been prevented, through inadvertence, misapprehension on the part of himself, or his agents or counsel, or by some other cause satisfactorily shown, from availing himself of the matter proposed to be introduced by his supplemental bill, at an earlier stage of the cause. The bill must be confined to such matter and be verified by affidavit, or other satisfactory proof. Whether the objection to a bill filed without leave, should be by demurrer or motion to dismiss, was a question not decided in this case, because the plaintiff moved for leave to file such bill, and the court considered it not too late, if sufficient cause were shown, to sustain it. Ib.

[A supplemental bill ought to be filed as soon as the new matter sought to be inserted therein is discovered. And if the party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review founded on such facts. Pendleton v. Fay, 3 Paige's Ch. Rep. 204.]

So, where complainant at the coming in of defendant's answer is apprized of a stranger's interest in the subject of the suit, and awaits until decree, he will not be permitted to bring him before the court by supplemental bill. Quackenbush v. Leonard, 10 Paige's Rep. 133—4. 131.

Supplemental bid to put in issue matters which it is too (1) If a plaintiff, when his cause is in such a state that he cannot amend his bill, discovers new matter which may tend to show that he is entitled to the relief prayed by his bill, he may file a supplemental

this may be done as well after as before a decree;

bill for the purpose of putting the new matter in issue. Crompton v. late to introduce by amendment. Wombwell, 4 Sim. 628,

But a supplemental bill cannot be filed to put in issue matter which, Supplemental although not discovered till after the original cause was at issue, bill to put in a such that the might have been introduced into the original bill by amendment, by which ought to have been introduced. leave of the court. Colclough v. Evans, 4 Sim. 76. Dias v. Merle, duced by amend-4 Paige, 263. If so filed, defendant should object by demurrer, plea, (Fulton Bank v. New-York and Sharon Canal Co. 4 or answer. Paige's Ch. Rep. 131. 127.) Vide infra,

But after an original cause is at issue, the complainant may sometimes file a supplemental bill, in the nature of a bill of discovery, to obtain evidence in support of the matters put in issue in the original suit, of which evidence he was not apprized at the time of filing his replication. But that is strictly a bill of discovery in aid of the original suit, and should not pray relief. The complainant obtaining the discovery on such a bill, pays defendant's costs as in other bills for discovery merely. The bill in such cases is in the nature of a supplemental suit for a discovery, rather than a supplemental bill in the original suit. Where, however, no occurrence has taken place to change the rights of parties since the original suit was commenced, the rule in 4 Sim. 76, et supra, prevails. Complainant cannot after issue file the bill to put in issue new facts that might have been, introduced by amendment, although he allege they were unknown. The proper course where proofs have not been taken, is to app'y for leave to withdraw his replication and to amend his bill. Dias v. Merle, Id. 262-3.

Where by inadvertence a necessary party has not been brought be- Supplemental fore the court, and the suit is in that stage that the plaintiff cannot party. amend his bill, he may file a supplemental bill for the purpose of supplying the defect. Semple v. Price, 10 Sim. 238.

And where liberty is given at the hearing to amend a bill by adding a new party, the plaintiff may bring such new party before the court by a supplemental bill, instead of by amendment. And such supplemental bill may be filed against the new party alone; for as both suits will come on for hearing together, a decree may be made between the defendants to the two suits, although they are not parties to the same record. Greenwood v. Atkinson, 5 Sim. 419.

And the plaintiff may incorporate in such bill any other matter which might, independently of the order to amend, be the subject of a Wood v. Wood, 4 Y. & C. Eq. Ex. 135. See supplemental bill. note, supra.

Where a complainant amends his bill by a supplemental one, in

and the bill may be either in aid of the decree, that it may be carried fully into execution (h), or that proper directions may be given upon some matter omitted in the original bill (i) (1), or not put in is-

(h) Woodward v. Woodward, cree. See Giffard v. Hort, 2 Sch. & Dick. 33. Or it may be filed for the Lefr. 386.

purpose of appealing against the de
(i) 3 Atk. 133.

order to bring other parties before the court, he need not make the defendants in the original bill parties to the supplement 1 one. Ensw rth v. Lambert, 4 J. C. R. +05; M'Kown v. Yerks, 6 lb. 450; and see page 76, post. Still, if any of the original defendants have an interest in the supplemental matter, and justice requires they should be at liberty to join issue with the plaintiff upon the supplemental parts, then it is fit they should be made defendants. Biznall v. Alkins, 6 Madd. 369.]

A mere formal party to the original is not a necessary party to a supplemental bill, where the new matter does not affect his rights or interests. (Allen v. Taylor, 2 Green's Ch. Rep. 435 437, N. J)

Supplemental bill to supply the title to file the original bill.

If a supplemental bill is fied by the assignces of a bankrupt, stating that since the filing of the original bill they had obtained the necessary consent to the institution of the suit, which they had not obtained before, such supplemental bill is demurrable; for it is not the office of a supplemental bill to supply the title to file the original bill. King v. Tullock, 2 Sim. 469.

Supplemental bill seeking different relief from thatsought by the original bill.

Where a suit is instituted, on the ground of fraud, to restrain an action commenced on a bill of exchange, and pending the suit the plaintiff in the action recovers payment, the plaintiff in equity m y file as supplemental bill, praying a repayment of the amount recovered and the costs of the action. Pinkus v. Peiers, 5 Beav. 253.

Supplemental bill to supply a defect in an original bill.

(1) Accordingly, where residuary legarees file a bill against an executor, praying that the usual accounts may be taken; and the executor, by his answer alleges that there is a balance due to him from the testator's estate, in respect of partnership transactions between them; but the decree does not direct the master to investigate the partnership accounts, but only to take the common accounts; the legatees may file a supplemental bill praying for the taking of the partnership accounts, in order that the balance due; from the executor may be ascertained; for such a bill is a bill filed to supply a defect in the former bill, and in aid of the decree in the former suit. Cropper v. Knapman, 2 Y. & C. Eq. Ex. 338.

But where a creditor of a testator files a bill against the executor, praying that the usual accounts may be taken, and the executor by his answer claims to be a creditor of the testator, by payments made on

sue by it, or by the defence made by it (k); or to bring formal parties before the court (l): or it may be used as a ground to impeach the decree, which is the peculiar case of a supplemental bill in the nature of a bill of review, of which it will be necessary to treat more at large in another place. wherever the same end may be obtained by amendment, the court will not permit a supplemental bill to be filed (m) (1).

When any event happens subsequent to the time where a new of filing an original bill (n), which gives a new in-interest is acquired. terest in the matter in dispute to any person not a party to the bill, as the birth of a tenant in tail, or a new interest to a party, as the happening of some other contingency, the defect may be supplied by

his account to more than the amount of the assets, and the decree does not direct the master to report, and he does not report as to this claim; and the creditor files a supplemental bill, stating that the payments made by the executor were payments made on account of partnership transactions between the testator and the executor, and therefore were made partly for the executor himself, and praying that the partnership accounts may be taken, so that it may be ascertained what is due from the executor to the testator for the payment of the debt due to the creditor; such supplemental bill, according to the decision in Grant v. Grant, 5 Law J. Ch. Rep. (O. S.) 145, is demurrable, as an attempt to begin a new suit after having failed in a former suit for the same matter. This decision seems directly opposed to that in Cropper v. Knapman, for there does not appear to be any substantial distinction between the two cases. The editor conceives that the decision in Grant v. Grant is wrong.

(1) See Parker v. Constable, 15 Law J., C. R. (N. S.) 16, and Blackburn v. Staniland, 9 Jur. 1027. And see Colclough v. Evans, 4 Sim. 76; Greenwood v. Atkinson, 5 Sim. 419; Wood v. Wood, 4 Y. & C. Eq. Ex. 135, supra, p. 75, note.

⁽k) Jones v. Jones, 3 Atk. 110. Atk. 817; see p. 74, note (e).

⁽n) 1 Atk. 291; 3 Atk. 217; see (l) Ibid. 217.

⁽m) See Baldwin v. Mackown, 3 above, p. 74, note (e).

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Where a co-plaintiff is de-prived of his in-terest.

and is in fact merely so with respect to the rest of the suit, though with respect to its immediate object, and against any new party, it has in some degree the effect of an original bill. If any event happens which occasions any alteration in the interest of any of the parties to a suit, and does not deprive a plaintiff suing in his own right of his whole interest in the subject, as in the case of a mortgage or other partial change of interest; or if a plaintiff suing in his own right is entirely deprived of his interest, but he is not the sole plaintiff, the defect arising from this event may be supplied by a bill of the same kind, which is likewise commonly termed, and is, in some respects, a supplemental bill merely, though in other respects, and especially against any new party, it has also in some degree the effect of an original bill (1). In all these cases the parties to suit are able to proceed in it to a certain extent, though from the defect arising from the event subsequent to the filing of the original bill the proceedings are not sufficient to attain their full object.

a bill which is usually called a supplemental bill (o).

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Where the in-terest of a plain-tiff suing in autre

If the interest of a plaintiff suing in autre droit droudetermines. entirely determines by death or otherwise, and some other person thereupon becomes entitled to

> such subsequent event must not only be relevant, but material, see Milnet v. Lord Harewood, 17 Ves. 144, and of such a nature, that the relief count. sought in respect thereof cannot be obtained under the original bill.

(o) It may here be remarked, that Adams v. Dowding, 2 Madd. R. 53. [In this case it is said to be seldom necessary to file a supplemental bill where the original one is for an ac-Mole v. Smith, 1 Jac. & W. 665.

the same property under the same title, as in the case of new assignees under a commission of bankrupt, upon the death or removal of former assignees (p), or in the case of an executor or administrator, upon the determination of an administration aurante minori atate (q), or pendente lite, the suit may be likewise added to and continued by supplemental bill (r) (1). For in these cases there is

- (p) Anon. 1 Atk. 88; S. C. 1 Atk. 571; Brown v. Martin, 3 Atk. 218.
- (q) See Jones v. Basset, Prec. in
 Ch. 174; Cary's Rep. 22; Stubbs v.
 Leigh, 1 Cox R. 133.
- (r) In the case of an administration determined by death, a bill of revivor by a subsequent administrator has been admitted. Owen v. Curzon, 2 Vern. 237; Huggins v. York Build. Comp. 2 Eq. Ca. Ab. 3.

⁽¹⁾ Mr. Story, in Eq. Pl. n. 2, to § 340, thinks there is no well founded distinction taken by Lord Redesdale, between the cases of a determination of the interests of a plaintiff suing in autre droit, and in his own right, and cites Coop. Eq. Pl. 76, who insists there is no such distinction. Story, ibid. and n. 1, to § 349. "In each case it would seem the bill should be an original bill, in the nature of a supplemental bill, for it brings forward new interests by new parties." Ibid. And see the distinction laid down in Sedgwick v. Cleaveland, 7 Paige's Rep. 287, 290; Mills v. Hoag, Id. 18. And yet such a bill is founded on formal technical principles, rather than on any substantial difference from the former; the prominent distinction being it seems this, that the latter lies when the same parties or interests are before the court; the former, when new parties with new interests arise from events since the suit was instituted. Story, Id. § 396, et seq., citing Cooper Eq. Pl. 75, 76. Mitf. Eq. Pl. 63, and Sir Th. Plumer Commentary, in Adams v. Dowding, 2 Madd. Rep. 53, or Mitford, 63, 64. 72. 98, where it is held that a supplemental bill lies when any event happens after the filing of the original, which gives a new interest in the matter in dispute to any person not a party to the bill. But here, though usually called a supplemental bill, and is so, with respect to the rest of the suit, yet as to its immediate object, and against any new party, it has in degree the effect of an original. The bill is in nature of a supplemental, because it is original as to the new parties and interests; and in some sort supplemental also as being an appendage to the former bill as to old parties and interests. Id. § 316, and see 7 Paige, supra.

no change of interest which can effect the questions between parties, but only a change of the person in whose name the suit must be prosecuted; and if there has been no decree, the suit may proceed, after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendants must answer the supplemental bill, and either admit or put in issue the title of the new plaintiff. But if a decree has been obtained before the event on which such a supplemental bill becomes necessary, though the decree be only a decree nisi, there must be a decree on the supplemental bill, declaring that the plaintiff in that bill is entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and take the steps necessary to render it effectual .(s).

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whole interest, as in the case of a bankrupt or insolvent debt-

Where a sole plaintiff suing in his own right is deprived of his prived of his whole interest in the matters in ques-If a sole plaintiff suing in his own right is detion by an event subsequent to the institution of a suit, as in the case of a bankrupt or insolvent debtor, whose whole property is transferred to assignees, or in case such a plaintiff assigns his whole interest to another, the plaintiff being no longer able to prosecute for want of interest (t), and his

and Porter v. Cox, 5 Madd. 80, in which revivor seems to have been thought necessary. But as it cannot be stated a priori, that there will not be any surplus of the bankrupt's estate after satisfaction of the creditors, who may prove under the comnote, 4 Madd. 171, and the cases of mission, it seems impossible to insist, Randall v. Mumford, 18 Ves. 424, even where a plaintiff suing in his

⁽s) Brown v. Martin, 3 Atk. 218.

⁽t) Upon the question whether the bankruptcy of a sole plaintiff is, or ought to be considered an abatement of a suit, some difference of opinion has prevailed. See Sellas v. Dawson, rep. 1 Atk., Sand. Ed. 263;

assignees claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by a supplemental bill, but must be sought by an original bill (u) in the nature of a supplemental bill, which will be the subject of discussion in a subsequent page.

If a commission of bankrupt issues against any party to a suit, or he is discharged as an insolvent debtor, his interest in the subject is, unless he is a filed to bring asmere trustee, generally transferred to his assig-bankrupt party before the court. nees (x) (1); and to bring them before the court a supplemental bill is necessary, to which the bankrupt or insolvent debtor is not usually required to

own right becomes a bankrupt, that, as a general rule, the suit abates. And the truth of the proposition willbe more apparent from what is further stated in the next page of the

(u) See Harrison v. Ridley, Com. Rep. 589.

(x) 9 Ves. 86; 1 Ves. & B. 547; and see, as to the exceptions, Copeman w Gallant, 1 P. Wms. 314; 2 P. Wms. 318; Ex parte Ellis, 1 Atk. 101; 1 Atk. 159. 234; 6 Ves. 496; Joy v. Campbell, 1 Seh. & Lefr. 328; Ex parte Martin, 19 Ves. 491; S. C. 2 Rose, B. C. 331; Ex parte Gillett, 3 Madd. 28.

(1) [Moran v. Hays, 1 J. C. R. 339. Every argument which goes to show an insolvent to be a proper party before his discharge, applies with equal force, to prove that his assignees, after that event, are equally so. They stand, in relation to his property, precisely in the place of the insolvent. The assignees succeed to all the rights of the insolvent, which, in behalf of the creditors, they are bound to protect and defend. They have the same interest in the final issue of the cause; and, in the character of assignees, they are entitled to be heard. Deas v. Thorne, 3 J. R. 551, In Osgood v. Franklin, 2 J. C. R. 16, two of the plaintiffs had been discharged under an insolvent act, and another had died. The course taken was by a bill of revivor and supplement, whereby the assignees of the insolvents were made defendants, as well as the executors of the deceased party. It was objected, that they (the assignees) ought to have been plaintiffs; but the court determined the assignees could not be compelled to be plaintiffs. It was sufficient for the merit of the case that they were before the court.]

Where a bank rupt plaintiff may proceed himself in the suit.

assignees before the court.

be a party (1), although a bankrupt may dispute the validity of the commission issued against him(y). But, if plaintiff, a bankrupt may proceed himself in the suit, if he disputes the validity of the commission, or a bankrupt or insolvent may proceed if the suit is necessary for his protection (z), or if his assignees do not think fit to prosecute the suit, and he conceives that it is for his advantage to prose-When it is, and when it is not cute it (a). Under those circumstances, however, necessary for him to bring his he must bring the assignees before the court by supplemental bill, as any benefit which may be derived from the suit must be subject to the de-

- (y) The commission, however, cannot be actually impeached by him in the suit; his proper mode of disputing its validity is by an action at law, or by a petition to supersede the same. See Hammond v. Attwood, 3 Madd. 158; and see Bryant v. Withers, 2 Maule & Selw. 123; 15 Ves. 468; Ex parte M'Gennis, 18 Ves. 289; S. C., 1 Rose, B. C. 60; Ex parte Bryant, 2 Rose, B. C. 1; Ex parte Northam, 2 Ves. & B. 124; S. C., 2 Rose, B. C. 140; Ex parte Price, 3 Madd. 228; Ex parte Ranken, 3 Madd. 371; Ex parte Bass, 4 Madd. 270; Bayley v. Vincent, 5 Madd. 48; Ex parte Gale, 1 Glyn & J. 43.
- (z) Anon. 1 Atk. 263; 1 Madd. R. 425. And this seems to be another reason, why it cannot be a general rule that the bankruptcy of the plaintiff causes an abatement, even where he sues in his own right (2).
- (a) Lowndes v. Taylor, 1 Madd. R. 423; S. C., 2 Rose, B. C. 365. 432. If an uncertificated bankrupt should be desirous that a suit in respect of the property should be commenced or prosecuted, and his assignees should refuse to adopt that course, it seems, that to attain his object, he must petition for leave to use their names for the purpose of proceeding, he indemnifying them. 5 Ves. 587. 590; Benfield v. Solomons, 9 Ves. 77; 3 Madd. 158.

^{(1) [}In Collins v. Shirley, 1 Russ. & M. 638, a bill of foreclosure was filed against Shirley. He had taken the benefit of the insolvent act; and yet he was made a party with his assignees. The M. R. decided that Shirley had been made a party improperly, and ought, therefore to have his costs.]

^{(2) [}A bankrupt cannot file a bill of redemption in respect of his right to the surplus. But where he has a clear interest, and the assignees refuse, the court, upon petition and an offer of indemnity, will compel them to let him use their names. Spragg v. Binkes, 5 Ves. 590.]

mands of the assignees (b), unless he seeks his personal protection only against a demand which cannot be proved, or which the person making the demand may not think fit to prove, under the commission issued against the bankrupt, or from which the insolvent debtor may not be discharged (c).

Where the whole interest of a defendant is

And if by any event the whole interest of a defendant is entirely determined, and the same inte-determined, and rest is become vested in another by a title not derived from the former party, as in the case of succession to a bishopric or benefice, or of the determination of an estate-tail, and the vesting of a subsequent remainder in possession, the benefit of the suit against the person becoming entitled by the event described must also be obtained by original bill in the nature of a supplemental bill: though if the defendant whose interest has thus determined is not the sole defendant, the new bill is supplemental as to the rest of the suit, and is so termed and considered. But if the interest of a defendant is determined, but not determined, and only becomes vested in another another another. by an event subsequent to the institution of a suit. as in the case of alienation by deed or devise, or

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former party.

only vested in

(b) Although, it seems, the bankruptcy of a plaintiff, suing even in his own right, does not, at least as a general rule, abate the suit, it unquestionably renders it defective, 18 Ves. 427; and this court upon a special application will dismiss the bill, (but, as it seems, without costs,) unless the plaintiff make his assignees, or upon notice they make themselves parties thereto by supplemental bill within a limited time (1). Williams v. Kinder, 4 Ves. 387; Randall v. Mumford, 18 Ves. 424; Wheeler v. Malins, 4 Madd. 171; Porter v. Cox, 5 Madd. 80; S. C., 1 Buck, B. C. 469; Sharp v. Hullett, 2 Sim. & Stu.

(c) See p. 81, note (a).

^{(1) [}Query-Whether the insolvent might not, instead of proceeding by supplemental bill, petition the court to let him use their names in the suit, upon being indemnified? Spragg v. Binkes, 5 Ves. 590.]

by bankruptcy or insolvency, the defect in the suit may be supplied by supplemental bill, whether the suit is become defective merely, or abated as well as become defective (d) (1). For in these cases the new party comes before the court exactly in the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings from the beginning of the suit (e).

Where, in these cases, the suit has become abated, as well as defective.

In all these cases, if the suit has become abated as well as defective, the bill is commonly termed a supplemental bill in the nature of bill of revivor, as it has the effect of a bill of revivor in continuing the suit (2).

(d) See Rutherford v. Miller, 2
Anstr. 458; Russell v. Sharp, 1 Ves.
& B. 500; Whitcombe v. Minchin,
5 Madd. 91; Foster v. Deacon, 6
Madd. 59; Turner v. Robinson, 1
Sim. & Stu. 3. In the cases of Monteith v. Taylor, 9 Ves. 615, and
Rhode v. Spear, 4 Madd. 51, a motion on the part of the defendant,
after his bankruptcy, that the bill

might be dismissed, was allowed to be proper under the circumstances; which affords a ground, besides the reasons already intimated in relation to the plaintiff becoming bankrupt, so far as they apply, for presuming that the bankruptcy of the defendant does not abate the suit, but merely renders it defective.

(e) 1 Atk. 89.

Supplemental bill by an assignee of a defendant.

(1) An assignee of an insolvent defendant should not bring himself before the court by supplemental bill, until he has applied to the plaintiff to file a supplemental bill for the purpose of bringing him (the assignee) before the court, and the plaintiff has declined or neglected to do so. *Phillipps* v. *Clark*, 7 Sim. 231.

It was said in Slack v. Walcott, 3 Mason, 508, that a devisee may maintain an original bill in the nature of a bill of revivor, and thus obtain the benefit of the original proceedings, as well before as after there has been a decree in the original suit.

(2) [Westcott v. Cady, 5 Johns. Ch. Rep. 334.]

A bill by A. and B. was filed against C. to obtain conveyance of realty; and after a replication to C.'s answer, A. purchased B.'s interest in the subject, and died: his heirs at law filed a supplemental bill in the nature of a bill of revivor and supplement, to continue the proceedings in their names, as substituted complainants, entitled to

S. III.]

SEVERAL KINDS OF BILLS.

2. Wherever a suit abates by death, and the in- 2. Bills of reviterest of the person whose death has caused the abutes by death, and the interest abatement is transmitted to that representative of the deceased which the law gives or ascertains, as an heir at law, executor or administrator. executor or administrator, so that the title cannot be disputed, at least in the court of chancery, but the person in whom the title is vested is alone to be ascertained, the suit may be continued by bill of revivor merely (1). If a suit abates by marriage

the whole subject matter; to which bill C. answered, without oath, admitting the filing the original bill, but by a general traverse denying that any other allegations we e true to his knowledge or belief. On application by complainants in the supplemental bill to revive and continue proceedings, it was held that under the 23d Rule of the court, that as the facts in the supplemental bill, as to comp'ainants' interest in the subject matter were put in issue by the answer, the heirs should file a replication to such answer, and take proof of the matter put in issue in connection with the proofs of the matters upon the original bill; leaving the question as to the right of complainants to have the benefit of the original bill, and of the subject matter of the same to be finally decided at the hearing upon the proofs in the caus. And unless the facts put in issue by the answer to the supplemental bill, were proved by the complainants in the usual way, such bill should be dismissed at the hearing. If such fac's were proved, as well as the matters put in issue upon the original bill, the new complainants would be entitled to the same relief that the complainants in the original bill would have been entitled to, if they had both lived, and had continued to retain their interest in the subject matter of the litigation as it was at the commencement of the suit. (Day v. Potter, 9 Paige's Rep. 646, et seq. 645.)

(1) Where a bill, cross bill, and bill in nature of a supplemental bill of revivor, between the same parties and on the same subject, all abate by death of one of the parties in a partition suit, the whole proceedings may be revived by one bill of revivor, and, therefore, costs of two or more bills will not be allowed. (Wilde v. Jenkins et al., 4 Paice's Rep. 500. 481.)

On bill for account and distribution of an estate, if a distributor die, the suit must be revived against his personal representatives not next of kin. (Jenkins v. Freyer, 1d. 51. 47.)

On bill of revivor, the competency of the parties and correctness of the frame of the bill, are the only questions before the court. General

of a female plaintiff, and no act is done to affect

objections to the original bill, to show the case not of equitable cognizance should be reserved until after the revivor. Administrator and infant son and sole heir of a deceased defendant, are proper parties to this bill; for they are both proper parties to meet the exigency of the original. So also is one having a subsisting interest in the estate, as the immediate mortgagor from whom plaintiff derives title as mortgagee, and having an equal interest with plaintiff, to litigate the validity of an attachment, made by intestate. So held in Massachusetts, on demurrer to injunction bill to quiet title. (Bettes v. Dana, 2 Sumner's Rep. 385—6. 383.)

Upon the question of proper parties to bill to revive or continue the proceedings on the death or change of parties to an original bill, there has been conflict of opinion among practitioners, observes the chancellor in Farmers' Loan and Trust Co. v. Seymour, 9 Paige's Rep. 542; but having examined the subject to ascertain the true rule, he says:-"Where the abatement of a suit is caused by the death of one of several defendants, and the suit is revived by the complainant in the original suit, it appears to be only necessary, in a simple bill of revivor, to bring the representatives of the decedent before the court, without making the surviving defendants parties to such bill. So in the case of the death of one of several complainants, if the survivors are in a situation to entitle them to revive and continue the suit against his representatives, by making them defendants in a bill of revivor, Smith, (in 1 Smith's Practice, 394,) says it is not usual to make the other defendants, parties to such bill. In this last case, however, Daniell (3 Dan. Ch. Pr. 211,) appears to suppose that the original defendants in the suit, as well as the representatives of one of the complainants, as to whom the suit has abated, should be parties to the bill of revivor, filed by the surviving complainants.

"Without stopping to inquire which is right in the particular case supposed, it appears to be perfectly well settled, that when a bill of revivor, or a bill in the nature of a bill of revivor, is filed by any one who was not a party to the original suit, either as the representative of a deceased party, or otherwise, all the other parties to such original suit, who have any interest in the further proceedings therein, should be made parties to such bill, either as complainants or defendants. The general rule which applies to a simple bill of revivor against the representatives of one of several defendants, appears to hold in the case of a supplemental bill in the nature of a bill of revivor, to bring the devisee or assignee of the original defendants before the court." If a supplemental bill is only to bring in a new party on a given case, or in respect of antecedent facts on the record, he only need be party

the rights of the party but the marriage, no title Where the suit abates by marriage, and no

other act is done to affect the

defendant. But if it is to bring new facts before the cour', all the old rights of the pardefendants in the original bill should be parties to the supplemental ties.

The Revised Statutes of the State of New-York contain provisions which do away with a bill of revivor in many instances, and simplify, in other respects, the practice in case of death.

No suit in chancery is to abate by the death of one or more of the complainants or defendants when the cause of action survives, but, upon satisfactory suggestion of such death, the suit is to proceed for or against the surviving parties. 2 R. S. 184, § 107. The cases intended to be embraced by this section, are those where the right of the deceased party vests in some one of the survivors; so that a perfect decree may be made as to every part of the subject of litigation, without any alteration of the proceedings or bringing any new parties before the court. Such is the case of a suit brought by or against two or more executors, trustees or joint tenants, where, on the death of one, the whole right of action or ground of relief survives in favor of or against the other. In such cases, there is, in fact, no abatement as to the survivors; and upon a proper application by either party, on affidavit, showing the fact of the death, and that the cause of action has survived, the court will order the suit to proceed. Leggett v. Dubois, 2 Paige's Ch. Rep. 212; and see Brown v. Story, Ib. 594.

No bill of revivor is necessary to revive a suit against the representatives of a deceased defendant; but the court upon a petition, may order it to stand revived. 2 R. S. 184, § 108. This section provides for another class of cases where some of the parties survive, and the rights of the parties dying do not survive to them, but some other persons become vested with the rights and interests, or are subject to the liabilities of those who are dead. In such cases, the complainants may proceed without making those persons parties, provided a decree can be made between the surviving parties without bringing such persons before the court. The decree, in that case, will not affect those in whom the rights of the deceased parties have become vested. Leggett v. Dubois, supra.

In cases where a complainant dies, and the cause of action does not survive, his representatives may, on affidavit of such death, and on motion in open court, be made complainants and be permitted to amend the bill. 2 R. S. 184, § 115; White v. Buloid, 2 Paige's Ch. Rep. 475. When the representatives do not cause themselves to be made complainants within eighty days after such death, the surviving complainant may proceed to make them defendants, as in cases where the representatives of a deceased defendant are made parties. 2 R. S.

can be disputed; the person of the husband is the

§ 117; Wilkinson v. Parish, 3 Paige's Ch. Rep. 653. If there be no surviving complainant, or such an one neglects or refuses to proceed against such representatives, the court, upon petition of the original defendant, may order such representatives to show cause why the suit should not stand revived in their names or the bill be dismissed, so far as the interest of such representatives is concerned. § 118, 119. If a defendant dies where the cause of action does not survive, and the complainant neglects or refuses to procure an order for the revival of the suit, the court may order it to stand revived upon the petition of a surviving defendant against the representatives of the deceased party. § 120, 121.

These provisions of the statute, authorizing the revival of a suit on motion or petition, extend only to those cases where, by the former practice of the court, the proceedings could be revived and continued by a simple bill of revivor. *Douglass* v. *Sherman*, 2 Paige's C. R. 358.

Under the above provisions a suit in chancery may be revived by a surviving complainant against the infant representatives of a deceased complainant. Wilkinson v. Parish, supra. If the parties against whom a suit is sought to be revived are beyond the jurisdiction of the court, or cannot be found to be served with the order, a formal bill of revivor must be filed, and the like proceedings had to obtain their appearance as are required in the case of absent, concealed or non-resident debtors. Ib. Partition suits are embraced by these sections. Ib.

As to office practice and service under these provisions, see the sections themselves and all the cases above referred to; and see *Pruen* v. *Lunn*, 5 Russ. 3.

It may be necessary to revive a suit against the personal representatives of a deceased defendant, who has disclaimed, and against whom the complainant waives all relief. Glassington v. Thwaites, 2 Russ. 458.

As to reviving on a conditional decree against a defendant, in case one of the complainants dies, see Ex^2rs of M^*Gough v. Ex^2rs of Hannington, 1 Hogan, 23.

In a case more recently decided in the late court of chancery of the State of New-York than those above quoted, the chancellor draws the following distinctions: If a suit abate by death of all the defendants, the general rule is strict that before a decree or decretal order, by which a defendant becomes entitled to an interest in the further continuance of the suit, neither he nor his representatives can sustain a bill of revivor. But after a decree the suit may be revived at the instance of a defendant or his representatives, if complainants or those who represent them neglect to revive it. "The New-York revised

sole fact to be ascertained, and therefore the suit

statutes, 2 R. S. 185, have given some rights to defendants and to the survivor of several defendants in the revival of suits which they did not before possess;" but its provisions do not extend to abatement by death of a sole defendant or of all the defendants, before they have obtained an interest by decree as mentioned. Where personal representatives of a deceased party are only entitled to relief against adverse party upon a conveyance to him of real estate descended to heirs at law of decedent, the heirs are necessary parties to a bill of revivor filed by them. (Souillard et al. v. Dias, 9 Paige's R. 394-5, 393.)

As to statute and practice in New-Jersey to save necessity of filing bills of revivor, see Ross v. Hatfield et al. 1 Green's C. R. 363, 364.

If a defendant, who has been served with a copy of the bill under Revivor on the the 23d order of August, 1841, dies, without having appeared, his death of a defendant without having appeared, his dant without having appeared. personal representative must be brought before the court; and for that ving appeared. purpose, an original bill, and not a bill of revivor, is necessary. dy v. Hull, 14 Sim. 21.

And in other cases where a person named as a defendant dies before appearance, an original bill, and not a mere bill of revivor, ought to be filed against his representative. Crowfoot v. Mander, 9 Sim. 396. See further as to bill of revivor. [Nicoll v. Roosevelt, 3 J. C. R. 60; Feomster v. Markham, 2 J. J. Marshall's R. 303. Where the cause of action against a deceased party does not survive, but some third person becomes ves ed with his interest or subject to his liabilities, the complainant may elect to proceed without reviving the suit against the representatives of the deceased party, provided a perfect decree can be made between the survivors without bringing such representatives before the court. Leggett v. Dubois, 2 Paige's C. R. 211.

If two bring a suit to redeem and one dies, the surviving plaintiff and heir of the deceased party cannot file an original bill; but should proceed by bill of revivor. Saunders v. Frost, 5 Pickering's R. 275.

See more as to bills of revivor, p. 76, 77, post, and notes there.

A bill of revivor, when necessary, may be filed of course without any order of the court granting permission to file such bill. Lewis v. Bridgman, 2 Sim. R. 465; Pendleton v. Fay, 3 Paige's C. R. 206.

As to the practice upon bills of revivor in Tennessee, see Lewis v. Outlaw, 1 Overton's R. 140.

Upon a bill of revivor in Kentucky, a subpæna is served. Stout v. Higbee's executors, 4 Monroe, 145.]

[Where one complainant files a bill of revivor, another cannot take the same course. A second bill would be stricken off the files. And even a defect of parties in the first bill affords no reason for keeping the second on file. Livesey v. Livesey, 1 R. & M. 10.]

may be continued in this case likewise by bill of revivor merely (1).

Ancient practice where a suit abated after a decree signed and enrolled. When a suit became abated after a decree signed and enrolled (f), it was anciently the practice to revive the decree by subpæna in the nature of a scire facias (g) (1), upon the return of which the party to whom it was directed might show cause against the reviving of the decree (h), by insisting that he was not bound by the decree (i), or that for some other reason it ought not to be enforced against him, or that the person suing the subpæna was not entitled to the benefit of the decree. If the opinion of the court was in his favor he was dismissed with costs. If it was against him (j), or sif he did not oppose the reviving of the decree, interrogatories were exhibited for his

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[A purchaser under a suit cannot revive. Backhouse v. Middleton. Freem. 132.]

(2) [And this appears to be still the practice in the Irish court of chancery. Cox v. M'Namara, 1 Hogan, 12.]

In Ohio, it is settled, that a bill of revivor, or petition in nature of, is the appropriate method to revive a decree against heirs of deceased respondent, and not scire facias, which is a more legal remedy and procedure. Curtis v. The Heirs of Hawn, 14 Ohio R. (Griswold's) 186-7, 185.

⁽f) 1 Ves. 182. 184. (g) 11 Ves. 311. (i) Brown v. Vermuden, 1 Ca. in Ch. 272.

 ⁽h) See 1 Vern. 426; Sayer v. (j) 1 Ca. in Ch. 273.
 Sayer, Dick. 42.

⁽¹⁾ As noted in reference to the doctrine of abatement by marriage, (ante, p. 69, note, the first abates even after decree by marriage of female complainant, but not of female defendant (see further ib.;) and it must be revived by bill, not petition; as the statute authorizing summary application by petition does not apply to such abatement. Where defendant as well as complainant may revive, the court will direct, that if complainant do not revive in a given time (say 60 days,) defendant shall be at liberty to file a bill of revivor. (Quackenbush v. Leonard, 10 Paige's R. 133-4, 131.)

examination touching any matter necessary to the proceedings (k). If he opposed the reviving of the decree on the ground of facts which were disputed, he was also to be examined upon interrogatories, to which he might answer or plead; and issue being joined, and witnesses examined, the matter was finally heard and determined by the court. But if there had been any proceeding subsequent to the decree this process was ineffectual (l), as it revived the decree only, and the subsequent proceedings could not be revived but by bill; and the enrolment of decrees being now much disused, it is become the practice to revive in all cases, indis- Modern practice.

criminately, by bill (m).

3. If the suit becomes abated, and by any act 3.Bills of revivor and supplement. beside the event by which the abatement happens the rights of the parties are affected, as by a settlement (n), or a devise (o) under certain circumstances, though a bill of revivor merely may continue the suit so as to enable the parties to prosecute it, yet to bring before the court the whole matter necessary for its consideration, the parties must, by supplemental bill, added to and made part of the bill of revivor, show the settlement, or devise, or other act by which their rights are affected (1).

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⁽k) Anon. 2 Freem. 128.

^{67;} Thorn v. Pitt, Sel. Ca. in Ch. 13 Ves. 161. 54; S. C., 2 Eq. Ca. Ab. 180.

⁽m) See Dunn v. Allen, 1 Vern. Bligh, P. C. 566.

^{426;} Pract. Reg. 90, Wy. Ed.

⁽¹⁾ Croster v. Wister, 2 Ch. Rep. (n) See Merrywether v. Mellish,

⁽o) See Rylands v. Latouche, 2

⁽¹⁾ Ross v. Hatfield et al. 1 Green's C. R. 365, 363. [See form of such bill, Willis, 352]

Mr. Story in Eq. Pl. note 1 to § 387, seems to think that an original bill in nature of bill of revivor and supplement (as new interests are brought forward) might be more proper, than a bill of revivor and supplement under which Lord Redesdale has put his illustration in the text.

And, in the same manner, if any other event which occasions an abatement is accompanied or followed by any matter necessary to be stated to the court, either to show the rights of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to show by or against whom the cause is to be revived, that matter must be set forth by way of supplemental bill, added to the bill of revivor (p) (1).

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4. If the death of a party, whose interest is not 4. Bills in the nature of bills determined by his death, is attended with such a of revivor. transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery, as in the case of a devise of a real estate (q), the suit is not permitted to be continued by a bill of revivor. An original bill, upon which the title may be litigated (r), must be filed; and this bill will have so far the effect of a bill of revivor, that if the title of the representative substituted by the act the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor (s).

⁽p) See Russell v. Sharp, 1 Ves. Huet v. Lord Say and Sele, Sel. Ca. & Bea. 500. in Ch. 53.

⁽q) Backhouse v. Middleton, 1 (s) Clare v. Wordell, 2 Vern. 548; Ca. in Ch. 173; S. C., 3 Ch. Rep. 1 Eq. Ca. Ab. 83; Minshull v. Lord 39, and 2 Freem. 132; Mosely, 44. Mohun, 2 Vern. 672; 6 Bro. P. C. (r) 1 Eq. Ca. Ab. 2, pl. 2 & 7; 36, Toml. Ed. (2)

^{(1) &}quot;If a person interested under a will files a bill for an account against the executors, not seeking to charge them for wilful default, and dies pending the suit, his personal representative cannot charge them by bill of revivor and supplement, if the acts complained of were known to the deceased plaintiff." Garrett v. Noble, 6 Sim. 504.

^{(2) [}It has been said, in Kentucky, that where a cause survives

5. If the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, ture of supplemental bills. and the same property becomes vested in another person not claiming under him, as in the case of an ecclesiastical person succeeding to a benefice, or a remainder-man in a settlement becoming en-

against the representatives of a defendant who dies before a decree, either a bill of revivor or original bill may be maintained. Lyle v. Bradford, 7 Monroe's R. 115.]

In New-York, where bill was filed against defendant as executrix of her deceased husband to reach property she had received as executrix, but which in equity was complainant's, and she died after decree in their favor, it was held that the surviving executor of the husband, who had not been made party, could be brought in only by an original bill in nature of bill of revivor and supplement; and the filing of a mere bill of revivor against him was improper. Evertson v. Ogden, 8 Paige R. 276-7, 275.

So an original bill in nature of bill of revivor and supplement is the proper bill where complainant assigns all his interest in the suit in the premises in controversy, and dies; his grantee cannot revive and continue by a simple bill of revivor. So where defendant in such original suit is entitled to revive, he must do so by a similar bill, as he cannot file a simple bill of revivor against the grantee of the complainant in that suit. A defendant in a suit can in no case file a bill to revive when adverse party neglects to revive, unless he shows he has an interest in the revival of the suit. A defendant may revive in all cases after a decree where he can have benefit from further proceedings, in case adverse party will not revive, as defendant must revive before he can appeal from a decree against him. When suit abates before bringing appeal, it follows he has an interest to revive wherever appeal lies, and where he would be absolutely without remedy excepting by a revival and an appeal. (Anderson v. White et al. 10 Paige's R. 578-9, 575.) See p. 86-8, infra.

In New-York, if by death of a party to an appeal to the chancellor (from decision of a surrogate, circuit judge or vice-chancellor under the late organization of that court,) his interest is not cast upon his heirs or personal representatives, the proceedings must be revived upon a petition in the nature of a bill of revivor and supplement. The proper mode to compel the new parties to answer such petition and the petition of appeal is to serve a subpæna as in the case of a bill of revivor and supplement, or if absentees, by advertising the usual order. Jauncey et al. v. Rutherford, 9 Paige's R. 279, 275, et. seq. 273.

titled upon the death of a prior tenant under the same settlement(t), the suit cannot be continued by bill of revivor, nor can its defects be supplied by a supplemental bill. For though the successor in the first case, and the remainder-man in the second, have the same property which the predecessor, or prior tenant, enjoyed, yet they are not in many cases bound by his acts, nor have they in some cases precisely the same rights. But, in general, by an original bill in the nature of a supplemental bill (1) the benefit of the former proceedings may be obtained(u). If the party whose interest is thus determined was not the sole plaintiff or defendant, or if the property which occasions a bill of this nature affects only a part of the suit, the bill, as to the other Distinction be fore observed supplemental merely.—There seems two bills as regards their effect. nature of a bill of revivor, and an original bill in the nature of a supplement bill. Upon the first the benefit of the former proceedings is absolutely obtained, so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause(x); and if any decree has been made in the first cause, the same decree shall be made in the second(y). But in the other

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⁽t) 2 Eq. Ca. Ab. 3, in marg; Osborne v. Usher, 6 Bro. P. C. 20, Toml. Donegall, 1 Sim. & Stu. 491. ed.; 1 Bro. P. C. 205; Lloyd v. (y) Clare v. Wordell, 2 Vern. 548; Johnes, 9 Ves. 37.

⁽u) 9 Ves. 54, 55.

⁽x) See Houlditch v. Marquis of

[.] Minshull v. Lord Mohun, 2 Vern. 672; 1 Eq. Ca. Ab. 83; 1 Atk. 89.

⁽¹⁾ See Woods v. Woods, note to p. 119.

case a new defence may be made; the pleadings and depositions(z) cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the court to make a similar decree (a).

The voluntary alienation of property pending a Effect of alienation pendente lite. suit by any party to it, is not permitted to affect the rights of the other parties if the suit proceeds without disclosure of the fact, except as the alienation may disable the party from performing the decree of the court (b). Thus, if pending a suit by a mortgagee to foreclose the equity of redemption, the mortgagor makes a second mortgage, or assigns the equity of redemption an absolute decree of foreclosure against the mortgagor will bind the second mortgagee, or assignee of the equity of redemption, who can only have the benefit of a title so gained by filing a bill for that purpose (c). But upon a bill by a mortgagor to redeem, if the mortgagee assigns pendente lite, the assignee must be brought before the court by the mortgagor, who cannot otherwise have a re-conveyance of the mortgaged property (d). The bill necessary in the last case is merely supplementary; but in the former, the bill

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⁽z) Earl of Peterborough v. Duchess of Norfolk, Prec. in Chan. 212; see also Coke v. Fountain, 1 Vern. 413, and City of London v. Perkins, 3 Bro. P. C. 602, Toml. ed., as to reading in one cause depositions taken in another.

⁽a) See Lloyd v. Johnes, 9 Ves. Jr. 37. And the commentary of Ld. Eldon, Id. 54, 55, on the passage in

the text; quoted in Story's Eq. Pl. n. 1 to § 350, p. 402, 4th ed.

⁽b) 2 Ves. & B. 205, 206; 4 Dow. P. C. 435. [Cook v. Mancisso, 5. Johns. C. R. 89. But see L'Estrange v. Robinson, 1 Hogan, 202.]

⁽c) 2 Atk. 175; 11 Ves. 199.

⁽d) 11 Ves. 199; and see Wetherell v. Collins, 3 Madd. 255. [Also Metcalfe v. Pulvertoft, 2 V. & B.

must be an original bill in the nature of a cross bill, to redeem the mortgaged property. If the party aliening be plaintiff in the suit, and the alienation does not extend to his whole interest, he may also bring the alienee before the court by a bill, which, though in the nature of an original bill against the alience, will be supplemental against the parties to the original suit, and they will be necessary parties to the supplemental suit only so far as their interests may be affected by the alienation (c). Generally, in cases of alienation pendente lite the alienee is bound by the proceedings in the suit after the alienation, and before the alienee becomes a party to it (d); and depositions of witnesses taken after the alienation, before the alienee became a party to the suit, may be used by the other parties against the alienee as they might have been used against the party under whom he claims (e).

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Having considered generally the distinctions between the several kinds of bills by which a suit becomes defective or abated may be added to or continued, or by which the benefit of the suit may be obtained, it remains in this place to consider more particularly the frame of the first three of those

⁽c) There is an instance, in which the court, in a case of this kind, allowed an alienee of a plaintiff to participate in certain interlocutory proceedings, without previously requiring a supplemental bill to be filed for the purpose of making him a party to the Bligh, P.C. 593, note. suit. Toosey v. Burchell, 1 Jac. R. 159.

⁽d) It may be observed, however, that the alience may by supplemental bill, in the nature of an original bill, make himself a party to the suit (1). Foster v. Deacon 6 Madd. 59: and see Binks v. Binks, reported 2

⁽e) See Garth v. Ward, 2 Atk. 174.

⁽¹⁾ See note to p. 82.

kinds. The other two will form part of the subject to be considered under the next head.

1. A supplemental bill must state the original 1. Frame of supbill (1), and the proceedings thereon; and if the plemental bills, and the proceedsupplemental bill is occasioned by an event subse-ings thereon. quent to the original bill, it must state that event, and the consequent alteration with respect to the parties; and, in general, the supplemental bill must pray, that all the defendants may appear and answer to the charges it contains. For if the supplemental bill is not for a discovery merely, the cause must be heard upon the supplemental bill at the same time that it is heard upon the original bill, if it has not been before heard; and if the cause has been before

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heard, it must be further heard upon the supple-

[See the form of a "supplemental bill to obtain further discovery from a defendant, to put new matter in issue and add parties, where the proceedings are in such a state that the original bill cannot be amended for that purpose." Willis, 326, and observe the notes there. Also, for other forms of supplemental bills, see Equity Drafts. (2d edit.) 519, 522, 523, 525, 526, 527, 528. Also a supplemental bill in aid of a decree. Willis, 340.]

The practice in New-Jersey is not to reiterate substantially the charges of the original bill, but set them out by way of reference and charge the new and additional facts by way of supplement. Edgar v. Clevenger, 2 Green's C. R. (N. J.) 465, 464.

⁽¹⁾ The 49th order of Aug. 1841, declares, that "it shall not be contents of a necessary in any supplemental bill to set forth any of the statements bill. in the pleadings in the original suit, unless the special circumstances of the case may require it."

[&]quot;All that is required" in a supplemental bill "is, that the plaintiff should state so much of the case as shows that there was an equity." And in a case where he states that an injunction has been granted against the interference of certain directors with the funds of a company, he states sufficient to show that there was an equity for restraining a director subsequently elected from joining in interfering with those funds. Vigers v. Lord Audley, 9 Sim. 72.

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mental matter (f). If indeed the alteration or acquisition of interest happens to a defendant, or a person necessary to be made a defendent, the supplemental bill may be exhibited by the plantiff in the original suit against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only (g); unless, which is frequently the case, the interests of the other defendants may be affected by that decree. Where a supplemental bill is merely for the purpose of bringing formal parties before the court as defendants, the parties defendants to the original bill need not in general be made parties to the supplemental (h) (1).

(f) 2 Madd. R. 60. (h) See Brown v. Martin, 3 Atk. (g) See Brown v. Martin, 3 Atk. 217. (See pp. 74, 75 and notes, supra. 17.

Parties to a supplemental bill. (1) Where a bill is filed by one of two next of kin against the executors of a testator, and in consequence of an objection taken by the answer of the executors for want, of parties, a supplemental bill is afterwards filed to bring another next of kin before the court, the executors must be parties to the supplemental bill, in order that they may have an opportunity of stating upon the pleadings any case they may have as against such other next of kin. Jones v. Howells, and Jones v. Godsall, 2 Hare, 342.

Where one of several co-plaintiffs in an original suit mortgages his interest and becomes insolvent, defendants in such original suit who are trustees for the plaintiffs are necessary parties to a supplemental bill filed by the other co-plaintiffs against the mortgagee and provisional assignee; for otherwise the accounting parties, the trustees, might not know till the hearing to whom they were to account. Feary v. Stephenson, 1 Beav. 42.

In order to determine a question as to parties to a supplemental bill depending on facts alleged in the original bill, the court is bound to look at the allegations in the original bill. *Pinkus* v. *Peters*, 5 Beav. 253.

On this subject see also Greenwood v. Atkinson, note to p. 75, supra, and Collins v. Collins, note to p. 74, supra.

2. A bill of revivor must state the original bill (1), 2. Frame of bills and the several proceedings thereon, and the abate-the proceedings thereon. ment; it must show a title to revive (i), and charge. that the cause ought to be revived, and stand in the same condition with respect to the parties in the bill of revivor (1) as it was in with respect to the parties to the original bill at the time the abatement happened; and it must pray that the suit may be revived accordingly. It may be likewise necessary to pray that the defendant may answer the bill of revivor, as in the case of a requisite admission of assets by the representative of a deceased party (k).

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(i) Com. Rep. 590.

such a bill, Willis, 345.] Prac. Reg.

(k) [Douglas v. Sherman, 2 90, Wy. Ed. Paige's C. R. 358. See the form of

(1) The 49th order of Aug. 1841, declares, that "it shall not be Contents of a necessary in any bill of revivor to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it."

Prior to this order, it was necessary that a bill of revivor against Necessity for new parties should set forth so much of the original bill as shows the showing a title plaintiff's title to revive: otherwise it was demurrable. Phelps v. Sprowle, 4 Sim. 318.

And even now it is necessary for a plaintiff in a bill of revivor to state enough to show his title to revive the original suit against the defendant to the bill of revivor, and the precise character in which the defendant is brought before the court. For the statements of the bill of revivor cannot be explained by importing into it the statements of the original bill: for if that were allowed, the defendant to the bill of revivor could not safely demur until he had taken a copy of the original bill. Griffiths v. Rickitts, 3 Hare, 484.

(1) If a defendant dies, having appointed two executors, and only Executor who one of them proves, it is sufficient for the plaintiff to revive the suit has not proved against that executor. Strickland v. Strickland, 12 Sim. 463.

party.

When the suit has abated by the death of a co-plaintiff, whose right where the pardevolves to his representatives, it can only be revived by a bill, to ties to the original suit are newhich these representatives, the other plaintiffs, and all the defendants cossary parties to a bill of revito the original bill are parties. Cave v Cork, 12 Law J. (N. S.) 156, vor. V. C. B.

In this case, if the defendant does admit assets, the cause may proceed against him upon an order of revivor merely; but if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party to answer the demands made against it by the suit; and the prayer of the bill, therefore, in such case usually is, not only that the suit may be revived, but also, that in case the defendant shall not admit assets to answer the purposes of the suit, those accounts may be taken, and so far the bill is in the nature of an original bill. If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendment remaining unanswered.

Upon a bill of revivor the defendants must answer in eight days after appearance, and submit that the suit shall be revived, or show cause to the contrary; and in default, unless the defendant has obtained an order for further time to answer, the suit may be revived without answer, by an order made upon motion as a matter of course (l)(1). The ground for this

(l) See Harris v. Pollard, 3 P. Wms. 348.

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⁽¹⁾ By the 61st order of May, 1845, "the plaintiff in a bill of revivor, or of revivor and supplement, is entitled as of course, upon motion or petition, to the common order to revive, if a defendant, hav-

is an allegation that the time allowed the defendant to answer by the course of the court is expired, and that no answer is put in; it is therefore presumed that the defendant can show no cause against reviing the suit in the manner prayed by the bill (m).

An order to revive may also be obtained in like manner if the defendant puts in an answer submitting to the revivor, or even without that submission, if he shows no cause against the revivor. Though the suit is revived of course in default of the defendant's answer within eight days, he must yet put in an answer if the bill requires it: as, if the bill seeks an admission of assets, or calls for an answer to the original bill, the end of the order of revivor being only to put the suit and proceedings in the situation in which they stood at the time of the abatement, and to enable the plaintiff to proceed accordingly. And notwithstanding an order for revivor has been thus obtained, yet if the defendant conceives that the plaintiff is not entitled to revive the suit against him, he may take those steps which are necessary to prevent the further proceeding on the bill, and

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is necessary to warrant any proceed- ante p. 69, note.] ing after abatement, 1 Ves. 186;

(m) The court, after abatement of Roundell v. Currer, 6 Ves. 250, exa suit, has acted without revivor in cept proceedings to compel reviver, some instances, where the rights of or to prevent injury to the surviving the parties have been fully ascer- parties, if the persons entitled to retained by decree, or by subsequent vive neglect to do so. [See Leggett proceedings; but in general revivor v. Dubois, 2 Paige C. R. 213; and

ing appeared in person or by his own solicitor, does not within eight days after such appearance plead or demur to the whole bill, or to so much thereof as prays the revivor." And by the 62d order, where an appearance has been entered for the defendant by the plaintiff, and the defendant does not plead or demur within eight days afterwards, the court may make an order to revive, on motion upon notice.

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which will be noticed in treating of the different modes of defence to bills of revivor; and though these steps should not be taken, yet if the plaintiff does not show a title to revive he cannot finally have the benefit of the suit when the determination of the court is called for on the subject (n),

If a decree be obtained against an executor for payment of a debt of his testator, and costs, out of the assets, and the executor dies, and his representative does not become the representative of the testator, the suit may be revived against the representative of the testator, and the assets of the testator may be pursued in his hands, without reviving against the representative of the original defendant (o).

After a cause is revived, if the person reviving finds the original bill to require amendment, and the pleadings are in such a state that amendment of the bill would be permitted if the deceased party were living, the bill may be amended notwithstanding the death of that party, and matters may be inserted which existed before the original bill was filed, and stated as if the deceased party had been living (p).

After a decree a defendant may file a bill of revivor, if the plaintiffs, or those standing in their right, neglect to do it (q)(1). For then the rights

- (n) 3 P. Wms. 348.
- v. Peck, 2 Ves. 465.
- 1745; Philips v. Derbie, Dick. 98.

defendant or his representatives, if (o) 3 Atk. 773; and see Johnson he or they have an interest in the further prosecution of the suit, may (p) Kelips v. Paine, 15 March, revive, if the plaintiffs, or those standing in their right, neglect so to do,

(q) The general proposition, that a seems to be now fully established.

⁽¹⁾ Where a suit has become abated after a decree for an account,

of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and equally have a right to prosecute it (r). The bill of revivor in this case, therefore, merely substantiates the suit, and brings before the court the parties necessary to see to the execution of the decree, and to be the object of its operations, rather than to litigate the claims made by the several parties in the original pleadings (s), except so far as they remain undecided. In the case of a bill by creditors on behalf of themselves and other creditors, any creditor is entitled to revive (t). A suit become entirely abated may be revived as to part only of the matter in litigation, or as to part by one bill, and as to the other part by another. Thus, if the rights of a plaintiff in a suit upon his death become vested, part in his real, and part in his personal representatives, the real representative may revive the suit so far as concerns his title, and the personal so far as his demand extends (u).

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See Kent v. Kent, Prec. in Chan. 1 Eq. Ca. Ab. 2. 197; 1 Eq. Ca. Ab. 2; 2 Vern. 219, 297; Williams v. Cooke, 10 Ves. 406; Horwood v. Schmedes, 12 Ves. 311. And see Gordon v. Bertram, 1 Meriv. 154; Adamson v. Hall, 1 Turn. R. 258; Bolton v. Bolton, 2 Sim. & Stu. 371.

(r) See, however, Anon. 3 Atk. 691, and Lord Stowell v. Cole, 2 Vern. 296.

(8) See Finch v. Lord Winchelse, Ab. 3, 4.

(t) That is, of course, after he hath proved his debt. See Pitt and the creditors of the Duke of Richmond, 1 Eq. Ca. Ab. 3; and see Dixon v. Wyatt, 4 Madd. 392; 1 Sim. & Stu. 494. And, in such a suit, the personal representative of one of the plaintiffs deceased may revive. Burney v. Morgan, 1 Sim. & Stu. 358.

(u) Ferrers v. Cherry, 1 Eq. Ca.

and the plaintiff neglects to revive the suit, a defendant who is in- Bill of revivor terested in the account may file a bill to revive it and prosecute the filed by a defendant. decree, although he could not have filed the original bill. Devaynes v. Morris, 1 M. & C. 213.

3. Frame of bills of revivor and supplement.

3. A bill of revivor and supplement is merely a compound of those two species of bills, and in its separate parts must be framed and proceeded upon in the same manner (1).

III. Bills in the nature of origi-Their different kinds.

III. Bills in the nature of original bills, though occasioned by former bills, are of eight kinds: 1. Cross-bills. 2. Bills of review, to examine and reverse decrees signed and enrolled. 3. Bills in the nature of bills of review, to examine and reverse decrees either signed and enrolled, or not, brought by persons not bound by the decrees. 4. Bills impeaching decrees upon the ground of fraud. Bills to suspend the operation of decrees on special circumstances, or to avoid them on the ground of matter subsequent. 6. Bills to carry decrees into execution. 7. Bills in the nature of bills of revivor. And 8. Bills in the nature of supplemental bills.

1. Cross-bills, [81]

1. A cross-bill is a bill brought by a defendant when proper, and how tramed. against a plaintiff (x), or other parties in a former bill depending, touching the matter in question in

> (x) It has been decided, that a Glegg v. Legh, 4 Madd. 193; Parker cross-bill may be filed in Chancery to v. Leigh, 6 Madd. 115. an original bill in the Exchequer (2).

Revivorand supplement.

- (1) Where a suit abates after a general demurrer for want of equity has been filed, but before it has been heard, the plaintiff, or a person claiming in the same right, is at liberty to file a bill of revivor and supplement, alleging such supplemental matter as may be necessary to show by and against whom an order to revive may properly be obtained; but he is not at liberty to claim the same or additional relief by adding supplemental matter in corroboration of the original claim. and not required for the purpose of showing by and against whom an order to revive may properly be obtained. Bampton v. Birchall, 5 Beav. 330. See as to original bill in nature of revivor and supplement, p. 86, note.
 - (2) See note to p. 6, supra.

that bill (y) (1). A bill of this kind is usually.

(y) For an example of the sense Ves. J. 284, and see Piggott v. Wilin which this proposition is to be unleast of Madd. 95. [Galatian v. derstood, see Hilton v. Barrow, 1 Erwin, 1 Hopk. R. 58.]

(See 2 Bro. Civ. & Adn. Law, c. 8; Gilbert's Forum Romanum, c.

2-4; quoted by Story, Eq. Pl. c. 2, § 14, note 3, § 402.) "The practice," (the late chancellor of New-York observed, in White v. Buloid, 2 Paige's R. 164,) "in relation to cross-bills, does not appear to be well "settled either in this state or in the English Court of Chancery. It "may, therefore, be necessary to look into the origin of the practice "and notice the changes it has undergone, for the purpose of apply-"ing its principles to the present practice of this court under the new "mode of taking proofs openly, or in open court before the circuit "judges, as was done in the late equity courts. The bill and cross-"bill were derived from the civil law; and they answer to the conven-"tio and reconventio in the Roman tribunal. If the reconventio came "in before the litis contestatio or joining of the issue in the suit, it was "in time, and both causes went on pari passu. The same probatory "term was assigned to both; and the same time was given for publi-"cation. It is from this we find in the old books of practice, that the "cross-bill should be filed before or at the time of answering the " original bill, which generally answered to the litis contestatio of the "Roman law. If it did not come in before that time, the causes could "not proceed together, as the original cause was then gone from the " pratorian forum to the judices. (2 Bro. C. & A. L. 348. How. Eq. "side, 287.) Where the reconventio or cross-bill came in after the "litis contestatio or joining of issue, it did not stop the complainant in "the examination of his witnesses, unless the defendant in the recon-

"ventio was in contempt for not answering. If it came in even after publication, it was not too late, but the party must go to a hearing on the testimony taken in the original suit, and on the answer of the defendant in the cross-suit; because, after publication passed, no witnesses could be examined to the same matter as to which proofs had already been taken and published. (Cur. Canc. 337. Gilb. For. Rom. 47. Ward v. Eyles, Mosel, 382.) The English practice at the present day appears to be, to grant an order of course to stay publication until a fortnight after the answer to the cross-bill has come in, where the cross-bill has been filed in time, that is, before the issue has been joined in the original cause. (Hinde, 54. 1 Atk. Rep. 21) But, where the cross-bill is not filed until the original cause has been proceeded in, the motion to enlarge publication must

(1) Cross-bills, as well as many other branches of modern pleading Origin and uses and procedure, have been traced by analogy to the Roman civil law. of the cross-bill.

brought to obtain either a necessary discovery, or

"be special, and upon notice to the adverse party, that the court may "judge of it on the circumstances. (Aylett v. Easy, 2 Ves. sen. 336.) "In no case is the complainant in the original suit compelled to stay "proceedings therein without a special order for that purpose. Noel "v. King, 2 Mad. Rep. 392.) After both causes are at issue, or in a " situation to be heard, the complainant in the cross-suit may, on mo-"tion, have an order that both causes be heard together; a copy of "which is to be served on the solicitor for the complainant in the "original cause. But, notwithstanding this order, the delay of the "complainant in the cross-suit will not be permitted to delay the hear-"ing of the original cause. (How. Eq. side 289.) The practice on "this subject in the Irish court of chancery is undoubtedly more con-"ducive to the ends of justice, and is best adapted to our system of "taking testimony orally. There, the cross-bill must be filed on oath, "and the certificate of counsel that it is not intended for delay and "that it is necessary for the attainment of justice in the cause; and "the proceedings in the original cause are not to be delayed in any "case, unless upon the special order of the court, founded upon notice "of the application to the complainant therein." [And see Rule 42 of (late) N. Y. Chancery; and the Irish practice, above alluded to in Elliott v. Millett, and Millett v. Elliott, 1 Hogan's C. R. 125; and the order from O'Keefe's Rules there given. By rule of the Irish court of chancery, cross-bill will be taken off the file, if put on without a certificate of counsel. If the certificate of counsel has been subjoined, but the complainant has not filed the necessary affidavit, no subpæna to answer can issue. Elliot v. Millet, 1 Hogan's R. 125.]

Persons not party defendant to the original cannot file a cross-bill, but if so, and it is answered, it will not be dismissed on motion before final hearing. It might have been demurred to. Whether a decree can be made thereon, was a question reserved for the hearing, in Payne v. Cowan, and Naylor v. Payne et al. 1 Smedes & Marshall's C. R., Mississippi, 35, 26.

[By the English practice, if a bill and cross-bill are filed, the complainant in the original bill has a right to the first answer and may move to stay proceedings in the cross-cause till the original bill is answered, although the complainant in the cross-bill may be in a situation to enforce an answer first. Harris v. Harris, 1 Turn. & R. 165.]

So in Massachusetts by rule of chancery or equity side of Supreme Judicial Court, defendant in the cross-bill cannot be compelled to answer it until complainant therein has answered the original. (24 Pick. R. 413, R. 13.)

In New-York it is held that the proper time of filing cross-bill where

full relief to all parties. It frequently happens, and

such bill is necessary, is at the time of putting in the answer and before issue by replication thereto, and as the matters of defence upon which a cross-bill is founded must be stated in the answer to the original suit as well as in the cross-bill, it can be seldom necessary to delay the latter until after the cause is at issue. And if not filed until after issue, defendant is not entitled to order to stay proceedings until answer is made to his cross-bill, without showing some excuse for his neglect. (Irving v. De Kay, 10 Paige's R. 322 et seq. 319.)

And to entitle to stay proceedings in the original until answer to cross-bill, all the complainants in the cross-bill must join in the application; and the matters in the cross-bill must not be stated on information and belief, but must be sworn to by some one knowing the facts. The affidavit of such person should be obtained by complainant to corroborate their statement of information and belief. (Talmage v. Pell et al. 9 Paige's R. 412, 413, 410.)

In Massachusetts it is held, that as a general rule, it should be filed before publication of the evidence in the original suit, unless plaintiff in the cross-bill will go to a hearing on the proofs already published. But the court, if justice and equity of the case require, will, on motion, allow a cross-bill to be filed after the publication, and even after hearing of the cause, if it should thereupon appear that a cross-bill is necessary to a complete and equitable decree in the original suit: But otherwise a cross-bill filed after hearing and without leave of court cannot be sustained. A cross-bill, if filed in season, may, in Massachusetts, be sustained to obtain an equitable set-off, and generally, it should be filed before issue joined, (see p. 99, note, infra.) But the court say that though a cross-bill may, if justice require, be filed after issue, and even hearing, the proceeding in the original cause will not be delayed in any case without special order on notice of application to the adverse party; and in the above case where great latches were imputable to defendants if they intended to avail of a set-off, the original cause having been pending five or six years, before cross-bill filed, and that bill also pending for a year since, the court refused to subject the plaintiff in the original to further delay and dismissed the cross-bill. (Cartwright and another v. Clark, 4 Metcalf R. 109, 104.)

[In Field v. Schieffelin, 7 J. C. R. 250, it is said, that the court may, at a hearing, direct a cross-bill to be filed, when it appears that the first suit is insufficient to bring before the court the rights of the parties, and the matters necessary to a full and just determination of the cause. But see Sterry v. Servant, 1 lb. 62, and White v. Buloid, 2 Paige's C. R. 164.]

particularly if any question arises between two de-

[By the English practice, substituted service of a subpoena in a cross-cause is enough. Gardiner v. Mason, 4 B. C. C. 478. Query—Whether it would be allowed by the practice of the State of New-York? See Sawyer v. Sawyer, 3 Paige's C. R. 263.

Service of process is made, upon the filing of a cross-bill. Anderson v. Ward, 5 Monroe's R. 420.]

See further pp. 99, 100 and notes.

II. In what cases the bill may or not be exhibited.

A cross-bill is filed to bring more fully before the court a subject matter connected with the case made in the bill and which is necessary to a determination of the controversy. The necessity of a cross-bill may arise as well between two defendants as between one or more defendants and the complainant. (Hubbard v. Turner and others, 2 Mc Lean's R. 539, 540, 519.)

[A defendant cannot move for or obtain cross relief against the complainant, unless he files a cross-bill. Hare v. Collins, 1 Hogan, 193. And one defendant, it has been said, in Kentucky, cannot have a decree against another without a cross-bill. Talbot v. M'Gee, 4 Monroe's R. 378. But this may be questioned. Elliot v. Pell, 1 Paige's C. R. 263. Such a bill cannot contradict the assertions contained in the original answer. Hudson's executors, 1 Randolph's R. 117. A bill which does not pray that the cause may be heard at the same time with another cause, and one decree be had in both, is not, in form, a cross-bill. Wright v. Taylor, 1 Edwards' V. C. 226.]

[It seems, that a cross-bill may set up additional facts not alleged in the original bill where they constitute part of the same defence, relative to the same subject matter. *Underhill* v. Van Cortland', 2 J. C. R. 339, 355. But it must be confined to the subject matter of the bill. *May v. Armstrong, 3 J. J. Marshall's R. 262.

So, in Fletcher v. Wilson et al. 1 Smedes & Marshall, C. R., Mississippi, 391, 376, it was held that defendant cannot introduce new and distinct subjects of litigation from those in original suit. But if he have any claim upon the property he may assert it affirmatively in cross-bill.

In Talmage v. Pell et al. 9 Paige's R. 412, 413, 410, (on application to stay proceedings of original bill until answer be made to a cross-bill,) it was held, that where new matters of defence are discovered after answer, but existed before, defendant should apply for leave to file a supplemental answer instead of resorting to a cross-bill only.

In Kentucky and some other states, answers in nature of cross-bills, are allowed. But it is not the established English practice. The benefit of a cross-bill has been given in England to an answer; but it is regarded as a departure from the general rule. And the Supreme

fendants to a bill, that the court cannot make a complete decree without a cross-bill or cross-bills to

and Circuit Courts of the United States are governed in chancery (not by the local state practice, see ante p. 1, note, but) by the English practice. (Hubbard v. Turner et al. 2 Mc Lean's R. 539, 540, 519.)

But a cross-bill is now unnecessary in some cases where it was formerly required; as in bill for specific performance defendant sets up a different agreement and offers to perform it; the old course would have required a cross-bill, but now the court will decree specific performance of agreement actually set up and established by the defence.

But where no offer is thus made, it seems the plaintiff cannot have a specific performance, as it is not the case stated in his bill; but should on coming in of defendant's answer amend or move to dismiss without prejudice. (Story Eq. Pl. § 394, note, and authorities there cited.)

The cross-bill is derived from the Common Law—see Story Eq. Pl. § 402.

If the original bill be to set aside agreement or conveyance, or an award based thereon, defendant should file a cross-bill in order to establish the conveyance, in the event of a refusal to set it aside. (Carnochan v. Christie, 11 Wheaton R. 446; 6 Cond. R. 382, 394.)

To a suit instituted to obtain the benefit of an executed contract, Cross-bill as a a defence founded on a mistake as to the quantity of the interest in- for the benefit of tended to pass, or on inadequacy of consideration, or on the substitu- an executed contract. tion of another contract, cannot be made by answer, but must be made by a cross-bill. Richards v. Bayley, 1 Jones & Latouche, 120; Nash v. Flyn, id. 162.

To a bill for a specific performance of a partnership, a defendant Cross-bill as a cannot make the misconduct of another partner available as a defence defence to a bill except by means of a cross-bill. Englind v. Curling, 8 Beav. 129.

Where a suit is instituted by the lessees of an ecclesiastical corpo- a partnersmp. Cross-bill of disration for an account and payment of the value of tithes, to which covery against a lessor of tithes. suit the corporation are not parties, the occupiers, who are the defendants thereto, cannot file a cross-bill against the corporation, as well as against the lessees, for a discovery and production of documents. For such a suit is regarded as a mere possessory suit, and not as establishing the right to tithe; and therefore the corporation has no interest in the suit. And it would be extremely mischievous if a tenant in fee, whenever a dispute arises between his lessee and others, were to be compelled to produce his title deeds at the request of those other persons, and for the purpose of destroying his own title. v. Dean and Chapter of Canterbury, 3 Sim. 49. See further p. 99 and notes.

for a specific performance of

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bring every matter in dispute (y) completely before the court, litigated by the proper parties, and upon proper proofs. In this case it becomes necessary for some or one of the defendants to the original bill to file a bill against the plaintiff and other defendants in that bill, or some of them, and bring the litigated point properly before the court (z). A cross-bill should state the original bill, and proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of cross litigation, or the ground on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill. But a cross-bill being generally considered as a defence (a)(1), or as a pro-

- (y) [Rogers v. M'Machan, J. J. Marshall's R. 37, Troop v. Height, 1 Hopk. C. R. 239.]
- (z) There is an instance, however, in which this court will, it seems, contrary to the old practice, give the benefit of a cross-bill to a defendant upon his answer, namely, where the original bill is for specific perform-

ance, and he proves an agreement different from that insisted on by the plaintiff, and submits to perform the same, for, in such a case, if the court decide in favor of that stated by the defendant, it will decree the same to be executed. Fife v. Clayton, 13 Ves. 546; 15 Ves. 525.

(a) 3 Atk. 812.

(1) [Galatian v. Erwin, 1 Hopk. 58.]

Defendant in partition suit in chancery, in New-York, may set up in answer as a defence to the suit, the fact that he is in equity entitled to the whole premises of which partition is sought by the bill. Defendant must proceed by cross-bill, if, in addition to the denial of a decree for partition and a dismissal of the bill, he seeks full and affirmative relief on his part by a decree for a transfer to himself of the legal title to the whole premises, or if a discovery is necessary to establish his equitable defence. And where the new facts stated in the cross-bill constitute the grounds for an equitable defence to the original suit, as well as for further affirmative relief against the defendants in the cross-bill, it is proper to state such facts in the answer to the original bill, if the same are known to the defendant at the time of putting in such answer. (German v. Machin, 6 Paige's R. 290-1, 288.)

In Massachusetts, a cross-bill, if filed in season, (of which see note-

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ceeding to procure a complete determination of a matter already in litigation in the court, the plaintiff is not, at least as against the plaintiff in the original bill, obliged to show any ground of equity to support the jurisdiction of the court (b).

A cross-bill may be filed to answer the purpose of a plea puis darrein continuance at the common law(1).

(h) Doble v. Potman, Hardr. 160. mentioned by Blackstone, in 1 Bl. And see Sir John Warden's case, Rep. 132.

p. 98,) may be sustained to obtain an equitable set-off; and in such case, it is not necessary that plaintiff show any ground of equity as against the plaintiff in the original bill to support the jurisdiction; a cross-bill being considered as a defence in the original suit. To obtain the benefit of such a defence the cross-bill must generally be filed before the publication of the evidence and before issue joined; and if defendant has a counter demand against the plaintiff, he should regularly insist on it in his answer. But a cross-bill may, if justice require, be filed after issue and even hearing. (Cartwright v. Clark, 4 Metcalf's R. 109, 104.)

In New-York, a cross-bill to let in a set-off which by the 2 Revised Statutes 174, \S 40, may now be made in chancery as at law, is not necessary nor proper. It should be set forth in answer, in analogy to a plea of set-off and proved up in the hearing in support of the answer. And no such set-off can be allowed in a foreclosure suit under the Revised Statutes which could not be allowed as a proper subject of set-off in an analogous case at law for recovery of the mortgage debt. Where defendant has not such legal right of set-off, his cross-bill must not only show the existence of a debt due from the complainants in the foreclosure suit, but also that they are insolvent; so that injustice would be done if such set-off be not allowed and defendant left to his remedy against them by an independent suit. Or defendant must state some other ground of equity in his cross-bill which would have been sufficient to sustain an original bill in this court for a set-off. (Irving v. De Kay, 10 Paige's C. R. 322-3, 319.)

(1) It is of course to permit a defendant, who is discharged after the bill is taken as confessed, or after answer, to put in an answer in the nature of a plea puis darrein setting up that defence, unless complainant stipulate to take no personal decree against the bankrupt, or his subsequently acquired property, or consent to dismiss his bill without costs; or unless there was an allegation that the discharge was obtained by fraud. But where complainant as in this case, in opposi-

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Thus, where pending a suit, and after replication and issue joined, the defendant having obtained a release, attempted to prove it viva voce at the hearing, it was determined that the release not being in issue in the cause, the court could not try the fact, or direct a trial at law for that purpose, and that a new bill must be filed to put the release in issue. In the case before the court, indeed, the bill directed to be filed seems to have been intended to impeach the release on the ground of fraud or surprise, and therefore to have been a proceeding on the part of the plaintiff in the original bill. But it was clearly determined that without being put in issue in the

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tion to the motion, made affidavit of his belief that the discharge was fraudulent, and that he intended to contest its validity on that ground, the proper course is to authorize defendant to bring forward such defence by a cross-bill. (Scott v. Grant, 10 Paige, C. R. 485.)

In Smith v. Smith, 4 Paige 432, what was a bill for divorce a vinculo, &c., the court held that complainant's adultery, though after bill filed, is a bar to his suit. If after answer, the defendant, through mistake or inadvertence had neglected to set it up in her answer, she will be permitted, if she apply the first opportunity for leave, to amend her answer; (or, even after trial of feigned issue, it seems, it is not too late to set up the defence, if excuse be shown;) or, to file a supplemental answer to put that fact in issue, or a cross-bill in nature of a plea puis darrien continuance. The adultery of complainant, though committed after suit brought and feigned issue awarded, would be as effectual to bar the suit, if discovered in time, as if it had occurred previously to the adultery of the wife. Upon a proper application, therefore, even after trial of the feigned issue, and at any time before the final decree, if such application be made immediately after discovery of the fact, the court will permit defendant to put in such supplemental answer, or cross-bill in nature of plea puis, &c., for the purpose of setting up this new defence. Whether such defence may be by cross-bill in nature of a bill of review, where the fact is not discovered by defendant until after a final decree, is a question that seems not decided. (Idem. p. 434-5, 438.)

For form of cross-bill, see [Willis, 364.]

cause by a new bill it could not be used in proof (c).

Upon hearing a cause it sometimes appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties. This most commonly happens where persons in opposite interests are co-defendants, so that the court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject-matter of the suit. In such a case, if upon hearing the cause the difficulty appears, and a cross-bill has not been exhibited to remove the difficulty, the court will direct a bill to be filed, in order to bring all the rights of all the parties fully and properly for its decision; and will reserve the directions or declarations which it may be necessary to give or make touching the matter not fully in litigation by the former bill, until this new bill is brought to a hearing (d).

2. The object of a bill of review is to procure an examination and reversal of a decree (e) made upon view: a former bill, and signed by the person holding

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- (c) Hayne v. Hayne, 3 Ch. Rep. 19; 3 Swanst. 472, 474. See as to filing a supplemental bill where a matter has not been properly put in issue, Jones v. Jones, 3 Atk. 110; 1 Jac. & W. 339.
- (d) (See p. 98, note, supra.) If a creditor who hath come in under a decree against his debtor require relief for the purpose of assisting the investigations before the master, which cannot be obtained by a rehearing of the original cause he may, without direction of the court, seek
- (c) Hayne v. Hayne, 3 Ch. Rep. it by a cross-bill. Latouche v. Lord 3; 3 Swanst. 472, 474. See as to Dunsany, 1 Sch. & Lefr. 137.
 - (e) There can be no bill of review upon a decree of the court on exceptions to a decree of commissioners of charitable uses, under the statute. See Windsor v. Inhabitants of Farnham, Cro. Car. 40; Saul v. Wilson, 2 Vern. 118. Nor, upon a decree of this court confirming a judgment of the lord mayor, respecting tithes in London, under the statute 37 Hen. VIII. c. 12; Pridgeon's Case, Cro. Car. 351.

the great seal, and enrolled (f). It may be brought upon error of law appearing (g) in the body of the [84] decree itself (h), or upon discovery of new matter for error of law. (i) (1). In the first case the decree can only be

(f.) Tothill, 47; Boh. Curs. Canc. 353; Taylor v. Sharp, 3 P. Wms. 371. [Gelston v. Codwise, 1 J. C. R. 195; Wiser v. Blachly, 2 Ib. 488; Furman v. Coe, on appeal, 1 C. C. E. 96; Lansing v. Albany Insurance Company, 1 Hopk. 102; Elliott v. Pell, 1 Paige's C. R. 263; Litt. Sell. Ca. 125; Garner's administrator v. Strode, 5 Litt. 315; . M'Cracken's heirs, 1 Bibb, 455; Kenon's executors v. Williamson, 1 Hayw. 350; Bowyer v. Lewis, 1 Hen. & Munf. 558; Ellsley v. Lane's executors, 2 Ib. 589; Anon, 2 Law Recorder (Irish) 462.]

- (g) 1 Roll. Ab. 382. Venables v. Foyle, 1 Ca. in Cha 4; Tothill, 41.
- (h) Grice v. Goodwin, Prec. in Chan. 260; 3 P. Wms. 371.
- (i) Le Neve v. Norris, 2 Bro. P. C. 73, Toml. ed.; and see 17 Ves. 178. This term includes new evidence of facts put in issue, which would materially affect the judgment of the court, 16 Ves. 350. See Ord v. Noel, 6 Madd. 127, which, although a case relating to a supplemental bill in the nature of a bill of review, seems to show that the matter must be material, and such at the least as will raise a fit subject for judgment in the cause.

cree.

(1) "The mere propriety of a former decree cannot be questioned questioning the by bill of review: it is only where there is error on the face of it that mere propriety of a former des such a bill can be sustained." Haig v. Homan, 8 Cl. & F. 321.

> [A bill of review for error apparent must be for an error in law, arising out of the facts admitted by the pleadings, or recited in the decree itself as settled, declared or allowed by the court. It cannot be sustained upon the ground that the court has decided wrong upon a question of fact. Webb v. Pell, 3 Paige's C. R. 368; and see Dougherty v. Morgan's executors, 6 Monroe's R. 505.]

> So in Whiting et al. v. the Bank of the United States, 13 Peters, 14, 6; it being objected that no bill of review lies for errors of law, excepting where they appear on the face of the decree, the court by Justice Story, said: That is true in the sense in which the language is used in the English practice. In England, the decree recites the substance of the bill, pleadings and facts on which the court founds its decree. This is not ordinarily done in America. But the bill, answer and other pleadings, with the decree, are properly considered the record. Therefore the rule is the same in legal effect, although expressed in different language, viz.: that the bill of review must be founded on some error apparent upon the bill, answer, and other pleadings, and decree; and that evidence at large cannot be gone into to establish

reversed upon the ground of the apparent error (k);

*(k) Ladý Cramborne v. Dalma- Prac. Reg. 94, Wy. Ed.; 4 Vin. Ab. hoy, 1 Ch. Rep. 231; Nels. Rep. 86; 414.

an objection to the decree, founded on the supposed mistake of the court in its own d ductions from the evidence.

In Ohio, in Stevens v. Hay et al., 15 Ohio R. 317-19, 313, it is held, that if the court was mistaken as to matter of fact, it would seem to be the more correct course to correct the mistake on a rehearing thereby reviewed; that it is not, it is believed, the practice of the English court of chancery on the hearing of a petition of review to examine the proofs in the case. But in that country the facts are found by the court in first instance and if those facts sustain or are a proper foundation for the decree, the bill of review must be dismissed. The facts thus found are conclusive in the case. In Ohio the bill, answers and decree, constituting what they call the record, is what comes before the reviewing court. In that state, however, it has been held (7 Id. 372) that the original bill, answers, exhibits, and depositions are open for examination, the court examines the whole case and decides as if the matter was open before them in the same situation as it was when the decree was pronounced. If this course were not pursued where the decree contains no statement of facts found or principles decided, the bill for error in law would be useless. The difference between the Obio practice in drawing up and entering decrees and the practice in England and New-York, it is said, accounts for the departure in Ohio from what is elsewhere an established rule of proceeding. (Ludlow's heirs v. Kidd's heirs, 2 ld. 405-6; Strader v. Heirs of Byrd et al. 7 Id. 332.) But where the facts are expressly found and stated in the decree, there seems no reason why the English practice should be departed from. (Stevens v. Hay, supra.)

In Missis-ippi, it the case when decided was ready for final hearing and the court erred in rendering the decree only, the whole case is not re-opened; but the error in decree will be corrected so as to conform to the law. But if it was not ready for final hearing the whole is open for examination. (Mercer, administrator, v. Stark, 1 Smedes & Marshall C. R. 479.)

In case of miscasting and miscounting, where the matter demonstratively appears from the decree itself to be mistaken, it may be explained and reconciled by order. Seton on Decrees, 399, and cases there.]

The original decree will be reversed, because the testimony of an incompetent winess who was offered by the prevailing party was received in the original suit. (Dille et al. y. Woods et al., 14 Ohio Rep. (Griswold's) 125, 122.)

as if an absolute decree be made against a person,

So when the bill alleges title in several and the decree pursues its allegations, but the proof shows title to recover in part of complainants only.

The probata and the allegata must correspond. (Idem. 126, 122.)

Again, in Ohio, on bill of review in chancery to review the decree of a county supreme court of that state, it was held too late to object that the appeal from the common pleas was not regular (Brown v. Haines et al. 12 Ohio R. 1.) The finding of the court below upon the facts will be treated as a rule of practice, with not less respect than the finding of a jury on question of fact, fairly submitted to them; and that finding will not be reversed on mere difference of opinion as to the weight of evidence. If the party thought the facts of the case wrongly determined, say in court, he should have asked a rehearing rather than pursue a bill in the nature of a writ of error. (Buckley v. Gilmore & Hepkins, 12 Ohio R. 75, 63.)

It does not lie on a decree in a petition for divorce in Ohio. It was contended under the statute of that state declaring that all proceedings under the acts concerning marriages and divorces shall be in chancery, that all the incidents of a suit in chancery attach to these proceedings, and among others the right of review. Such, say the court, could not have been the intention of the legislature. Where a divorce is granted, upon which one of the parties contracts new relations and a third party acquires rights, it cannot be that a process could be had to reverse a decree, the consequence of which would be a severance of all those new relations. Such anomalous mischief cannot be engrafted on the practice of our courts except by clear and explicit legislative enactment. (Bascom v. Bascom, 7 Ohio R. 465, condensed from 7 Hammond R. 125, 2d part.)

Persons interested in the subject, though not parties to the original bill, may become such to the bill of review; and where, on overruling demurrer, the decree is reversed, the bill of review, as to such new parties, will be retained as a supplemental bill and stand for plea or answer, and the cause be proceeded in upon original and supplemental bills. (Ludlow's heirs v. Kidd's heirs, 2 Ohio R. 405-6; condensed from 2 Hammond 372.) In Bank of U. S. v. White et al., 8 Peters 268, 262, it was held that all the parties to the original decree ought to join in the bill of review. But parties who cannot be benefitted by a modification or reversal of the decree should not file the bill. [Webb v. Pell, 3 Paige's C. R. 368.] If not aggrieved by the decree no party to it can by the general principles of equity, claim a reversal, whatever may have been his right to insist on the error at the original hearing or on an appeal. (Whiting et al. v. The Bank of the United States, 13 Peters 14, 6.)

who upon the face of it appears to have been at the time an infant (l). A bill of this nature may be brought without the leave of the court previously given (m)(1). But if it is sought to reverse a decree signed and enrolled, upon discovery of some new matter (n), the leave of the court must be first obtained (o); and this will not be granted but upon allegation upon oath that the new matter (p) could not be produced, or used (q) by the party claiming the benefit of it at the time when the decree was made (r). If the court is satisfied that the new matter is relevant and material, and such as might probably have occasioned a different determination (s) it will permit a bill of review to be filed (t) (2).

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- Ves. 178.
- (m) 2 Atk. 534; Houghton v. West, 2 Bro. P. C. 88, Toml. Ed.
- (n) 2 Ves. 576; 3 P. Wms. 372; Nels. Rep. 52.
- (o) Tothill, 42; 2 Atk. 534; 17 Ves. 177. [See cases, note (1.)]
- (p) See O'Brien v. O'Connor, 2 Ball & B. 146.
- (q) See 1 Ves. 434; Patterson and Slaughter, Ambl. 292, and 16 Ves.
- (r) 2 Bro. P. C. 71. Toml. Ed.; Pract. Reg. 95, Wy. Ed.; Ambl. 293.

(1) Prac. Reg. 225, Wy. Ed. 17 [Livingston v. Hubbs, 3 J. C. R. 124; Respass v: M'Clenahan, 2 Marsh. 578; Winston v. Executor of Johnson, 2-Munf. 305.]

- (s) Lord Portsmouth v. Lord Effingham, 1 Ves. 430; Bennet v. Lee, 2 Atk. 529; and see Willan v. Willan, 16 Ves. 86.
- (t) Lord Portsmouth v. Lord Effingham, 1 Ves. 430; Young v. Keighly, 16 Ves. 348. But leave to file a bill of review is matter of discretion with the court. See Wilson v. Webb, 2 Cox, R. 3.

[For the form of a bill of review for error or law apparent in the decree, see Willis, 368.]

As to bill of review on discovery of new matter, see next page and notes.

(1) [Webb v. Pell, 1 Paige's C. R. 564; Edmonson v. Moseby's heirs, 4 J. J. Marshall's R. 500; Bleight v. M'Ilvoy, 4 Monroe's R. 145]

A person who was not a pary to a suit for the construction of a Bill to re-deterwill, may file a bill, after a decree enrolled in that suit, to have the mine a question construction of the will re-considered and re determined, without leave after decree. of the court. Urguhart v. Urguhart, 13 Sim. 623.

⁽²⁾ Wiser v. Bluchly, 2 J. C. R. 488; Farman v. Coe, on appeal,

Error in matter of form only, though apparent on

1 C. C. E. 96. New matter, it has been said, is no ground for a bill of review, unless it was discovered after the decree was pronounced. Winston v. Executors of Johnson, 2 Munf. 305; but this is not so, it is sufficient if it did not come to his knowledge till after publication, or when, by the rules of the court, the party could not make use of it. If it came to the knowledge of the party's attorney, solicitor, or agent, before the cause was heard, it is considered as notice to the party. Morris v. Le Neve, 3 Atk. 35; and see Standish v. Radley, 2 Atk. 199; Lord Portsmouth v. Lord Effingham, 1 Ves. sen. 434.

And it has been said, in Kentucky, that the complainant must allege new matter not necessarily in issue upon the original bill. *Tilman* v. *Tilman*, 4 J. J. Marshall's R. 119.

A bill of review will not be sustained on the ground that the chancellor who made the decree was interested in the stock of the complainants, a corporation, if the decree was by consent or merely formal, so that the chancellor did not personally exercise his judgment in it. Nor will it be sustained for newly discovered matter of error in the proceedings, which, with ordinary diligence, the party might have discovered before. Nor unless the complainant shows himself aggrieved by the decree. Lansing v. Albany Ins. Co., Hopk. 102.

And additional circumstances, which merely confirm facts proved in the original cause, do not furnish sufficient grounds for a bill of review. Randolph's executors v. Randolph's executor, 1 Hen. & Munf. 180. Newly discovered evidence, which goes to impeach the character of witnesses examined in the original suit, or of cumulative evidence to a litigated fact, is not sufficient. The matter of fact newly discovered must be relevant, and materially affecting the ground of the decree. Livingston v. Hubbs, 3 J. C. R. 124

The rule as laid down in Ohio is this: If the application for reversing the decree be for newly discovered evidence, it should not be of such as was before the court on former hearing or merely cumulative. If a rule should be adopted of reversing a decree merely to let in cumulative evidence, it is difficult to see where a case could be ended. As often as a new witness is discovered, there must then be a review, and nothing short of statute of limitations would put an end to the litigation. The matter must not only be new, but such as the party could not by reasonable diligence have known; for if there were any negligence or laches in this respect it destroys the title to relief. (Stevens v. Hay et al., 5 Ohio R. (Griswold's) 317-319, 313; also Kelly v. Stanbery. 13 Id. 410-411, arg.)

[And it has been said, in the chancery of Kentucky, that a bill of review will not be granted upon a fact which was formerly in issue in

the face of a decree, seems not to have been considerd as sufficient ground for reversing the decree (s); and matter of abatement has also been treated as not capable of being shown for error to reverse or for matter of abatement. a decree(t).

It has been questioned whether the discovery of Whether it is necessary that new matter not in issue in the cause in which a should be evidecree has been made, could be the ground of a in issue. bill of review (u); and whether the new matter on which bills of review have been founded has not always been new matter to be used as evidence to prove matter in issue, in some manner, in the original bill (x). A case, indeed, can rarely happen in which new matter discovered would not be, in some degree, evidence of matter in issue in the original cause, if the pleadings were properly framed. Thus, if after a decree, founded on a revocable deed, a deed of revocation and new limitation were discovered; as it would be a necessary allegation of title under the revocable deed that it had not been revoked, the question of revocation would

(s) Jones v. Kenrick, 5 Bro. P. C.

(t) Slingsby v. Hale, 1 Ca. in Cha. 122; S. C. 1 Eq. Ca. Ab. 164.

(u) See 16 Ves. 354.

(x) Ambl. 293.

244, Toml. Ed.; but the cause was compromised. Hartwell v. Townsend, 2 Bro. P. C. 107, Toml. Ed.

the same cause or evidence newly discovered, unless the evidence be in writing or of record. Head v. Had's administrator, 3 A. K. Marshall's R. 121. Also, that where, upon a bill of review, the decree is reviewed or impeached, the defendants, provided the decree was obtained by default, should be permitted to file answers or to plead, so that the matter of the original bill may be litigated between the parties. Mayesback v. Fountleroy, 3 J. J. Marshall's R. 536.]

If the facts in petition for the bill, verified by oath, lay a sufficient foundation for the bill, the court will not inquire if he can prove the facts. The merits cannot be tried on the petition. (Quick v. Lilly, 2 Green C. R. 258, 255.)

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have been in issue in the original cause, if the pleadings had been properly framed. So if after a decree founded on a supposed title of a person claiming as heir, a settlement or will were discovered which destroyed or qualified that title, it would be a necessary allegation of the title, of the person claiming as heir, that the ancestor died seised in fee-simple, and intestate. But if a case were to arise in which the new matter discovered could not be evidence of any matter in issue in the original cause, and yet clearly demonstrated error in the decree, it should seem that it might be used as ground for a bill of review, if relief could not otherwise be obtained (x) (1). It is scarcely possible, however, that such a case should arise which might not be deemed in some degree a case of fraud, and the decree impeachable on that ground. In the case where the doubt before mentioned appears to have been stated, the new matter discovered, and alleged as ground for a bill of review, was a purchase for valuable consideration, without notice of the plaintiff's title; this could only be used as a

(x) This court refused its leave to file a bill of review, where it would have been the means of introducing an entirely new case, of the matter of which the plaintiff was sufficiently well apprized to have been able, with the exertion of reasonable diligence, to have brought the same at first completely before the court. Young v. Keighly, 16 Ves. 348. And see

Ord v. Noel, 6 Madd. 127, and Bingham v. Dawson, 1 Jac. R. 243, which, although cases relating to supplemental bills in the nature of bills of review, illustrate this principle. See also Ludlow v. Lord Macartney, 2 Bro. C. C. 67, Toml. Ed.; Le Neve v. Norris, 2 Bro. P. C. 73, Toml. Ed.; M'Neill v. Cahill, 2 Bligh, P. C. 228.

⁽¹⁾ See Partridge v. Osborne, note to page 108, infra., and note, p. 102, supra.

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defence; and it seems to have been thought that although it might have been proper, under the circumstances, if the new matter had been discovered before the decree, to have allowed the defendant to amend his answer and put it in issue, yet it could not be made the subject of a bill of review: because it created no title paramount to the title of the plaintiff, but merely a ground to induce a court of equity not to interfere. And where a settlement had been made on a marriage in pursuance of articles, and the settlement following the words of the articles had made the husband tenant for life, with remainder to the heirs male of his body, and the husband claiming as tenant in tail under the settlement had levied a fine, and devised to trustees, principally for the benefit of his son, and the trustees had obtained a decree to carry the trusts of the will into execution against the son, the son afterwards, on discovery of the articles, brought a bill to have the settlement rectified according to the articles, and a decree was made accordingly.

In this case the new matter does not appear to have been evidence of matter in issue in the first cause, but created a title adverse to that on which the first decree was made(y).

A bill of review upon new matter discovered has been permitted even after an affirmance of the de-Bill for review after affirmance of the decree in cree in parliament (z); but it may be doubted parliament. whether a bill of review upon error in the decree

⁽y) Roberts v. Kingsly, 1 Ves. 238. directed as to the fact of the dis-If this case is accurately reported, covery of the articles. See Young the bill seems to have been filed with. v. Keighly, 16 Ves. 348. out the previous leave of the court; and on the hearing an inquiry was and see 16 Ves. 89.

⁽z) Barbon v. Searle, 1 Vern. 416;

review.

Bill of review must be brought within twenty 106

itself can be brought after affirmance in parliament Second bill of (a). If upon a bill of review a decree has been reversed, another bill of review may be brought upon the decree of reversal (b) (1). But when twenty years have elapsed (2) from the time of pronouncing a decree, which has been signed and enrolled, (3) a bill of review cannot be brought (c);

(a) 1 Vern. 418.

(b) 2 Chan. Pract. 633; and see Neal v. Robinson, Dick. 15; but see 1 Vern. 417.

(c) Sherrington v. Smith, 2 Bro. P. C. 62, Toml. Ed.; Smythe v. Clay,

1 Bro. P. C. 453, Toml. Ed.; Edwards v. Carroll, 2 Bro. P. C. 98,. Toml. Ed.; Lytton v. Lytton, 4 Bro. C. C. 441. [See Thomas v. Harvie, 10 Wheat. 106.]

(1) From an examination of authorities to ascertain the usages of courts of equity, which by statute in Ohio were to guide the court in their mode of proceeding, the following rule was deduced: When a demurrer to a bill of review has been sustained or allowed-in other words, where according to our practice the bill has been dismissed and the original decree thereby affirmed—no subsequent bill of review will lie; but where the original decree has been reversed, this decree of reversal may be reviewed. The rule is based on sound reason. Where there have been two concurrent decrees, as in the case of the demurrer allowed, it is time that the litigation should be ended; but where the original decree has been reversed, there the matter of equity may still be considered as doubtful. Strader v. Heirs of Byrd et al., 7 Ohio R. 331, 330, (condensed from 7 Hammond R. 184.)

(2) Twenty years is the English rule, and here five, in analogy to the time of bringing writs of error for matters apparent. Story Eq. Pl. § 410. Although bills of review are not strictly within the statutes of limitation, yet a court of equity, in analogy to the provisions of the judiciary act concerning appeals, will not allow a bill of review to be filed after five years. Thomas v. Harvie, 10 Wheat. 146. Yet see Edwards v. Carroll, 5 B. P. C. 466; 6 B. C. C. 395; Smith v. Clay, Ambl. 645, but more full, 3 B. C. C. 639. And, query—whether a bill of review on the ground of newly discovered evidence, will be governed by such limitation? In such case it would seem to be discretionary with the court. Ib.]

When the saving clause of statute of limitations gives right to review decree to one of the parties, and the right is entire, the right of reversal enures to benefit of all. (Massie's heirs v. Matthew's executors and Wallace, 12 Ohio R. 353, 351.)

(3) It is said, enrolments in England are but little known or prac-

and after a demurrer to a bill of review has been allowed, a new bill of review on the same ground cannot be brought (d). It is a rule of the court, Bringing it does not prevent the that the bringing a lift of an about the execution of the that the bringing a bill of review shall not prevent former decree. the execution of the decree impeached; and if money is directed to be paid, it ought regularly to be paid before the bill of review is filed, though it may afterwards be ordered to be refunded (e) (1).

- (d) Dunny v. Filmore, 1 Vern. 135.
- (e) Ord. in Cha. Ed. Bea. 3; 2 Brown P. C. 65, Toml. Ed. note.

ticed, and therefore bills of review rarely brought. But in America decrees are matters of record and deemed enrolled as of the preceding term so as such bill here is the proper and ordinary proceeding. (Story Eq. Pl. § 403.)

An original decree is to be deemed recorded and enrolled, by the practice of the United States courts in chancery, as if the term in which the final decree was passed. A bill exhibited afterwards to revise errors for want of parties, or want of proper proceedings after the decree against his heirs, after death of a party, is a bill of review in contradistinction to a bill in the nature of a bill of review; which lies only where there has been no enrolment of the decree, the former being by the original parties and their privies in representation is also properly a bill of review in contradistinction to an original bill in the nature of a bill of review which brings forward the interests affected by the decree, other than those founded in privity of representation. (Whiting et al. v. The Bank of the United States, 13 Peters, 13, 6.)

(1) By the third and fourth of Lord Bacon's orders, "No bill of Pre-requisite of review shall be admitted, or any other new bill to change matter view, or abill of decreed, except the decree be first obeyed and performed." The true that nature. interpretation of these words is this-that before a party can file a bill of review, or a bill of the nature of a bill of review, even by leave, he must perform so much of the decree as he is bound to perform at that time. But he may file a bill of review, or a bill of the nature of a bill of review at any time after leave is obtained, even before he has performed the decree, as regards those things which by the decree he was not bound to perform till a period subsequent to the time when such leave is obtained. Partridge v. Usborne, 5 Russ. 195.

[See Wiser v. Blachly, 2 J. C. R. 488. Nothing will excuse the party from paying the money and costs, but evidence of his inability to perform it. There is wisdom in the establishment of such a pro-

Frame thereof. In a bill of this nature it is necessary to state (f)the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it (g); and the ground of law, or new matter discovered, upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it (h), and the fact of the discovery (i). It has been doubted whether after leave given to file the bill, that fact is traversable; but this doubt may be questioned if the defendant to the bill of review can offer evidence that the matter alleged in the bill of review was within the knowledge of the party who might have taken the benefit of it in the original cause (k). The bill may pray simply

- 2 Chan. Prac. 629.
 - (g) 4 Vin. Ab. 414, Pl. 5.
- (h) See 1 Vern. 292; Boh. Curs. Canc. 396, 397.
- (i) Hanbury v. Stevens, Trin. 1784, in Chancery.
- (k) In the above mentioned case of Hanbury and Stevens, which was

(f) 2 Prax. Alm. Cur. Can. 520; upon a supplemental bill in nature of a bill of review, the court seemed to be of opinion that the fact of the discovery was traversable; and not being admitted by the defendant, ought to have been proved by the plaintiff to entitle him to proceed to the hearing of the cause.

vision and it ought to be duly enforced. Its object is to prevent abuse in the administration of justice, by filing bills of review for delay and vexation, or otherwise protracting the litigation to the discouragement and distress of the adverse party. Ib., Living ston v. Hubbs, 3 J. C. R. 124. It has been said, in North Carolina, that placing the amount of a decree in the hands of the master, in bank notes, is such a substantial compliance with the order of the court as will save the party from an imputed neglect or contempt, and authorize the filing of a bill of review. Taylor v. Person, 2 Hawks' R. 298.]

[As to deposit on filing a bill of review, see Webb v. Pell, 1 Paige's C. R. 564; and 173, Rule of N. Y. Chancery.

As to the practice in Virginia upon a bill of review, see note to Ellzley v. Lane's executors, 2 Hen. & Munf. 589; Quarrier v. Carter's: representatives, 4 Hen. & Munf. 242.]

that the decree may be reviewed, and reversed in the point complained of, if it has not been carried into execution (l). If it has been carried into execution, the bill may also pray the further decree of the court, to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand (m). The bill may also, if the original suit has become abated, be at the same time a bill of revivor (n) (1). A supplemental bill may likewise be added if any event has happened which requires it (o)(2); and particularly if any person not a party to the original suit becomes interested in the subject, he must be made a party to the bill of review by way of supplement (p).

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To render a bill of review necessary the decree Supplemental bill in the nature sought to be impeached must have been signed and of a bill of review. enrolled. If, therefore, this has not been done, a decree may be examined and reversed upon a species of supplemental bill, in the nature of a bill of review where any new matter has been discovered

^{(1) 17} Ves. 177.

⁽p) Sands v. Thorowgood, Hardr.

⁽m) 2 Chan. Prac. 634.

^{104.} See supra, p. 106, note, and

⁽n) 2 Prax. Alm. Cur. Canc. 522. 101, note.

⁽o) Price v. Keyte, 1 Vern. 135.

⁽¹⁾ Such a bill must be founded upon an affidavit of the discovery of new matter, and cannot be filed without the special leave of the court. Neither can it be filed without making the deposit, or giving the security required upon a bill of review. Wilkinson v. Parish, 3 Paige's C. R. 653.

⁽²⁾ Thus the bill may partake of the compound character of a bill of review, of revivor and of supplement; and be maintainable if it present facts that go to the merits of the original decree. Whiting et al. v. The Bank of the United States, 13 Peters, 13, 6.

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since the decree (q)(1). As a decree not signed and enrolled may be altered upon a rehearing without the assistance of a bill of review, if there is sufficient matter to reverse it appearing upon the former proceedings (r) (2) the investigation of the decree must be

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Gartside v. Isherwood, Dick. 612; 17 Ves. 177; or, at the least, the new matter should have been discovered after the time when it could have been introduced into the original

(q) 2 Atk. 40, 178; 3 Atk. 811; and see Barrington v. O'Brien, 2 Ball & B. 140. See p. 106, note, supra; [Wiser v. Blackly, 2 J. C. R. 488; Lawrence v. Cornell, 4 J. C. R. 542.]

(r) The rehearing, which is thus cause. Ord v. Noel, 6 Madd. 127; far alluded to, not being sought in

new matter.

(1) A plaintiff, or a defendant against whom a decree is made, may bill in the nature of a bill of review, and to bring forward matter is not capable of being needed after such decree, although such matter is not capable of being needed accordance for the supplemental bill in the nature of a bill of review, and to bring forward matter discovered after such decree, although such matter is not capable of being needed accordance for the supplemental bill in the nature of a bill of review, to bring forward matter discovered after such decree, although such matter is not capable of being used as evidence of anything previously put in issue, but constitutes an entirely new issue. Partridge v. Usborne, 5 Russ. 195; Barnes v. Offer, 5 Russ. 225, note.) Thus, where a person who is afterwards decreed to perform a contract for the purchase of a timber estate, applies to the auctioneer for, and obtains a written statement of the quantity of timber by a surveyor, before he bids for the estate; and after being decreed to perform his contract, he discovers that the quantity of timber is much less than is represented in such statement; the court will give him leave to file a supplemental bill in the nature of a bill of review, and to apply to have the original cause set down to be reheard, and to come on at the same time, although his answer to the original bill does not raise any objection as to the quantity of timber. Partridge v. Usborne, 5 Russ. 195. In this case, the purchaser adduced evidence of the auctioneer and others to show that the auctioneer warranted the quantity of timber, and stated that the admeasurement exhibited by him to the purchaser agreed with another admeasurement by another eminent surveyor, although in reality the two materially differed. But the fact of the warranty was controverted by the evidence of a greater number of persons: and neither that fact nor the other circumstance above mentioned were adverted to in the judgment of the lord chancellor, Lord Lyndhurst.

Petition of rehearing dis-missed because grounded on new facts.

(2) Where in a suit for the administration of a testator's personal estate, part of which is undisposed of, the bill sets forth the will of the testator, made some years before his death, in which he is described as of a certain colony, where the effects of intestates are not distributed

brought on by a petition of re-hearing (s) (2); and

respect of any new matter, is obtained upon certificate of counsel, 18 Ves. 325, by a petition merely, which states the case as brought before the court when the decree was made, Wood v. Griffiths, 1 Meriv. 35; and the grounds on which the re-hearing is prayed, 1 Sch. & Lefr. 398. And here it may not be improper to notice, that the court will not, without consent, 3 Swanst. 234, vary a decree after it has been passed and entered, except as to mere clerical errors, Lane v. Hobbs, 12 Ves. 458, Weston v. Haggerstan, Coop. R. 134; Hawker v. Duncombe, 2 Madd. R. 391; 3 Swanst. 234; Tomlins v. Palk, 1 Russ. R. 475; or, matters of course, 7 Ves. 293; Pickard v. Mattheson, 7 Ves. 293; Newhouse v. Mitford, 12 Ves. 456, unless upon a petition of rehearing, or upon a bill of review, or 17 Ves. 178.

bill in the nature of a bill of review, 4
Madd. 32; Grey v. Dickenson, 4
Madd. 464; Brackenbury v. Brackenbury, 2 Jac. & W. 391; Willis v.
Parkinson, 3 Swanst. 233; Brookfield v. Bradley, 2 Sim. & Stu. 64, according as the decree has or has not been signed and enrolled; and as it is sought to have the case re-heard as originally brought before the court, or accompanied with new matter. See Text.

(s) Taylor v. Sharpe, 3 P. Wms-371; 2 Ves. 598; Gore v. Purdon, 1 Sch. & Lefr. 234; 2 Jac. & W. 393. It must be remarked that where there is new matter, a petition to re-hear the original cause must be presented, and be brought before the court at the same time as the supplemental bill, in the nature of a bill of review. Moore v. Moore, Dick. 66; 17 Ves. 178.

according to the English statute of distributions; but the bill prays that the property undisposed of may be distributed according to that statute; and there is no allegation that the testator was domiciled in the colony, or that the law of England is not applicable to the distribution of his property, either in the bill, or in the answers, or in the master's report, or in the evidence, or at the hearing; and the property is ordered to be distributed according to the statute; but afterwards a petition for a re-hearing is presented, in which those facts are alleged as a ground for a re-hearing; such petition will be dismissed. Nevinson v. Stables, 4 Russ. 210.

(2) [A petition of rehearing will be dismissed, if it suggests, as the ground of re-hearing, facts not alleged in the pleadings. Nevinson v. Stables, 4 Russ. 210. See 112, 113, 114, and 115, Rules of N. Y. Chancery. A re-hearing is not a matter of course, except in the cases provided for by rule. Travis v. Waters, 1 J. C. R. 48; Eastburn v. Kirk, 2 lb. 317; Land v. Wickham, 1 Paige's C. R. 256; Wiser v. Blachly, supra. Where a decree has been entered by consent, there can be no re-hearing. Monell v. Lawrence, 12 J. R. 521. Nor will it be granted after a decree to account, exceptions to a master's report taken and disallowed, acquiescence of the party therein, and a final report made up and confirmed. Ridg. Lap. & Scho. 602.]

See form of such a petition, 2 Harr. Chan. (ed. 1790) 32. The peti-

the office of the supplemental bill in nature of a bill of review, is to supply the defect which occasioned the decree upon the former bill (t) (1). It is necessary to

(t) Standish v. Radley, 2 Atk. 177.

tion, it seems, should be presented previously to filing the supplemental bill.

Rehearings rest in sound discretion of the court, not of right. Application for rehearing on ground of newly discovered evidence is mainly governed by some considerations as apply where leave is asked to file supplemental bill after publication of proofs and before hearing, in order to bring up newly discovered evidence; or where leave is asked after decree to file bill of review, or bill in the nature of a bill of review, on ground of newly discovered evidence. (Daniel v. Mitchell, 1 Story's R. 200, 198.)

Rehearings have been exceedingly rare in the circuit courts of the United States; and ought to be, unless some plain, obvious, palpable error, omission or mistake in something material to the decree is brought to the notice of the court, which had before escaped its attention. The Supreme Court of the United States habitually refused rehearings after it has pronounced its judgment. The English practice has guards that do not exist here, where counsel and client are brought into immediate and constant contact. But such as is the practice in England it is the source of almost interminable delays and inconveniences. When a cause is once fully argued and an appeal lies from the decree, there is ordinarily no reason for a rehearing here on the original evidence. The application to be maintainable the petition should pray leave to file supplemental bill, to bring forward new evidence and for a rehearing of the cause at the time when the supplemental bill should also be ready for a hearing.

To bring forward new evidence unless it be an exhibit or some documentary proof omitted by slip, to be read or proved on final hearing, must be by supplemental bill. The new evidence to found such bill should be such, as, if unanswered, would require a reversal of the decree. New oral testimony to corroborate evidence on one side or contradict it on the other on points in issue, is insufficient; and if the evidence was such as the party might by due diligence have originally introduced, or where he had full means of knowledge in his reach, the bill will not be admitted after an interlocutory decree. Jenkins v. Eldredge, 3 Story's R. 304-7, 310, 311, 314, et seq. 299.

(1) [See the form of such a bill, Willis, 376. Such a bill cannot be filed, where a party could have filed an ordinary supplemental bill, but waits doing so until after a decree. *Pendleton* v. Fay, 3 Paige's C. R. 204.]

obtain the leave of the court to bring a supplemental bill of this nature (u), and the same affidavit is required for this purpose as is necessary to obtain leave to bring a bill of review on discovery of new matter (x)(1). The bill in its frame nearly resembles

v. Johnson, 17 Dec. 1737.

(x) As to the general principles 3 Paige R. 653.

(u) Order, 17 Oct. 1741, Ord. in adopted by the court in relation to Cha. Ed. Bea. 366; 2 Atk. 139, note; bills of this kind, see Ord v. Noel, 6 3 Atk. 811; 2 Ves. 597, 598; Bridge Madd. 127; Bingham v. Dawson, 1 Jac. R. 243; Wilkinson v. Parish,

(1) Where a decree is made against executors, not charging them with what they might have received, but for their wilful default, but afterwards a bill is filed which seeks so to charge them, it is a supplemental bill in the nature of a bill of review, and must not be filed without the leave of the court. Hodson v. Ball, 11 Sim. 456; 1 Phil. 177.

And where a vendor contracts to sell leasehold premises for the remainder of a term granted by a certain lessor, and the specific performance of the contract is decreed, the purchaser may not, without the leave of the court, file a supplemental bill, stating the fact that the premises called by the name by which they are designated in the contract partly consist of premises comprised in a lease granted by another lessor, and praying a declaration that the premises comprised in both leases are comprised in the contract, and that the contract may be specifically performed accordingly. For where a supplemental bill is brought to supply a defect in the pleadings and decree in the original cause, and the decree upon it can only be obtained on a rehearing of the decree in the original cause; such bill is a supplemental bill in the nature of a bill of review, which ought not to be filed without the leave of the court. Davis v. Black, 6 Beav. 393.

Where a supplemental bill seeks a species of relief which may be inconsistent with the relief afforded by the decree in the original suit, though it be only in one respect, and that in regard to the transactions of a few days, the bill is irregular, if filed without leave of the court; and the defendants are not precluded from insisting on the irregularity, by having answered the bill; because, although the defendants should waive the objection arising from the want of leave to file the bill, yet the court itself would be concerned to prevent inconsistent decrees from being made. Such an irregularity may, however, be corrected by a stay of the proceedings, without prejudice to the plaintiff's right to file a new bill, or to apply for leave of the court to file a bill of review.

a bill of review, except that instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is re-heard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires (y).

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3. Bills in the nature of a bill of review. 3. If a decree is made against a person who had no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest (z), relief may be obtained against error in the decree by a bill in the nature of a bill of review (a)(1). Thus, if a decree is made against a tenant for life only, a remainderman in tail or in fee cannot defeat the proceedings against the tenant for life, but by a bill showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his

(y) See 17 Ves. 177, 178. See (z) Brown v. Vermuden, 1 Ca. in note, p. 110, supru. Cha. 272.

(a) See 17 Ves. 178.

This point arose in a case where the plaintiffs would have been entitled, in the original suit, to interest on the amount due to the estate of a deceased partner whom they represented; but by a supplemental bill they sought for a declaration that they were entitled, at their option, either to participate in the profits made by the defendant, the surviving partner after the death of the deceased partner, or to be allowed interest upon the balance due to the deceased partner's estate. Toulmin v. Copland, 4 Hare, 41.

⁽¹⁾ See form of bill. [Willis, 378.]

It lies only after final decree, not where the subject is still before the court in fieri upon master's report in pursuance, and of an interlocutory decree. (Jenkins v. Eldridge, 3 Story's R. 302, 299. See p. 106, note, supra.)

own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to and answer this new bill, and the rights of the parties may be properly ascertained (1). A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court (b)(2).

4. If a decree has been obtained by fraud it may 4. Bills to impeach decrees be impeached by original bill (c) without the leave for fraud. of the court (d); the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated. (3). And where

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- 20, Toml. Ed.
- (c) 1 P. Williams, 736; Loyd v. Mansell, 2 P. Wms. 73; 3 P. Wms. 111; Wichalse v. Short, 3 Bro P. C. 558, Toml. Ed.; and see Kennedy v. Daly, 1 Sch. & Lefr. 355; and Giffard v. Hort, 1 Sch. & Lefr. 386. Davoue v. Fanning, 4 J. C. R. 199; Murray v. Murray, 5 Ib. 60; Williams v. Fowler, 2 J. J. Marshall's R. 405; Edmonson v. Mosly's heirs,

(b) Osborne v. Usher, 6 Bro. P. C. 4 Ib. 97.] In 3 P. Wms. 111, it is said that a decree in such case may be set aside on petition; but this was probably meant to extend only to the case of a decree not signed and enrolled, and where the fact of fraud could not be controverted. See Mussel v. Morgan, 3 Bro. C. C. 74; 2 Sch. & Lefr. 574.

> (d) 3 Atk. 811; 1 Ves. 120; Ca. Temp. Talbot, 201.

^{(1) [}And it would seem, where a bill by a vendor of land, seeking a specific performance of the contract, is dismissed on account of a defect in the title, and he can afterwards make title, that he may come in again by an original bill in the nature of a bill of review. Hepburn v. Dunlop, 1 Wheat. 179, 195.]

⁽²⁾ In Quick v. Lilly, 2 Green's C. R. New-Jersey, 257-8, 255, it was held on a petition for leave to file such bill, that to justify it, on ground of newly discovered matter, the evidence discovered must be new, and material. The new matter must be such as, if unanswered in point of fact, would clearly entitle party to a decree, or raise a case of so much nicety and difficulty as to be a fit subject of judgment in a cause.

⁽³⁾ See form of bill, [Willis, 381.]

The bill to impeach or set aside judgment or decree for fraud, must

a decree has been so obtained the court will restore the parties to their former situation, whatever their rights may be (e). Beside cases of direct fraud in obtaining a decree, it seems to have been considered, that where a decree has been made against a trustee, the cestui que trust not being before the court, and the trust not discovered, or against a person who has made some conveyance or encumbrance not discovered, or where a decree has been made in favor of or against an heir, when the ancestor has in fact disposed by will of the subject-matter of the suit, the concealment of the trust, or subsequent conveyance, or encumbrance, or will, in these several cases, ought to be treated as a fraud (f). It has been also said that where an improper decree has been made against an infant, without actual fraud, it ought to be impeached by original bill (g)(1). When a decree

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197, Toml. Ed.; and see Powell v. Martin, 1 Jac. & W. 292. And it enrolment of the decree by the one party is a fraud or surprise upon the

(e) Birne v. Hartpole, 5 Bro. P. C. other it will be vacated. Stevens v. Guppy, 1 Turn. R. 178.

(f) See Style v. Martin, 1 Ca. may be remarked, that where the Cha. 150; Earle of Carlisle v. Goble, 3 Cha. Rep. 94.

(g) 1 P. Wms. 737; 2 Ves. 232.

set forth precisely the particular circumstances of fraud. (Pendleton v. Galloway et al. 9 Ohio R. 178.)

In a suit in Ohio, on a judgment in Virginia, and upon plea that it was obtained by fraud, it was held that it could only be directly impeached in chancery. The general doctrine of the books is that fraud avoids all judicial acts. But even as to foreign judgments the inclination now is to hold them conclusive. (Martin v. Nicolls, 3 Simon R. 458.) A fortiori a judgment of a sister state which has all the force and validity of a domestic judgment cannot be impeached collaterally. (Anderson v. Anderson, 8 Ohio R. 108, et seq.)

(1) A fortiori where there was fraud; a decree against minor defendants, rendered upon the answer of their guardian ad litem, may be thus impeached and reversed. Massie v. Matthew's executors and Wallace, 12 Ohio R. 351.

has been made by consent and the consent has been fraudulently obtained, the party grieved can only be relieved by original bill (h).

A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached The prayer must necessarily be varied according to the nature of the fraud used, and the extent of its operation in obtaining an improper decision of the court.

5. The operation of a decree signed and enrolled 5. Bills to sushas been suspended on special circumstances, or decrees. avoided by matter subsequent to the decree, upon a new bill for that purpose. Thus during the troubles after the death of Charles the First, upon a decree for a foreclosure in case of non-payment of principal, interest and costs due on a mortgage, the mortgagor at the time of payment being forced to leave the kingdom to avoid the consequences of his engagements with the royal party, and having requested the mortgagee to sell the estate to the best advantage and pay himself, which the mortgagee appeared to have acquiesced in; the court, upon a new bill, enlarged the time for performance of the decree, upon the ground of the inevitable necessity which prevented the mortgagor from complying with the strict terms of it, and also made a new decree on the ground of the matter subsequent to the former decree (i).

Whorewood, 1 Ca. in Cha. 250; Wakelin v. Walthal, 2 Ca. in Cha. 8. The embarrassments occasioned by the civil war in the reign of Charles I., and the state of affairs after his death, before the restoration of

⁽h) Ambl. 229. [And see Monell v. Lawrence, on appeal, 12 Johns. R.

⁽i) Cocker v. Bevis, 1 Ca. in Cha. 61. See also Venables v. Foyle, 1 Ca. in Cha. 3; and Whorewood v.

 $\lceil 95 \rceil$ ecution.

6. Sometimes, from the neglect of parties, or 6. Bills to carry decrees into ex- some other cause, it becomes impossible to carry a decree into execution without the further decree of the court (k). This happens, generally, in cases where the parties having neglected to proceed upon the decree, their rights under it become so embarrassed by a variety of subsequent events, that it is necessary to have the decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party, nor claims under any party, to the original decree, but claims in a similar interest, or is unable to obtain the determination of his own rights till the decree is carried into execution (l). Or it may be brought by or against a person claiming as assignee of a party to the decree (m). The court in these cases in general only enforces, and does not vary, the decree; but on circumstances it has sometimes considered the directions, and varied them in case of a mistake (n) (1); and it has even on circumstances refused

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> ordinary applications to the court of chancery for relief, and perhaps induced the court to go far in extending relief; but there were many cases of extreme hardship in which it was deemed impossible, consistently with established principles, to give relief; and all cases determined soon after the restoration, upon circumstances connected with the prior disturbed state of the country, ought to be considered with much caution.

Charles II. occasioned many extra- (k) 2 Chan. Rep. 128; 2 Vern. 409.

> (1) See peculiar case of Rylands v. Latouche, 2 Bligh, P. C. 566.

(m) Organ v. Gardiner, 1 Ca. in Cha. 231; Lord Carteret v. Paschal, 3 P. Wms. 197; S. C. on appeal, 2 Bro. P. C. 10, Toml. Ed.; Binks v. Binks, rep. 2 Bligh, P. C. 593, note.

(n) See for example Hamilton v. Houghton, 2 Bligh, P. C. 164; and see Sel. Ca. in Cha. 13.

⁽¹⁾ The general rule is, that the court will not, unless under special circumstances, examine the justice of the decision or the law of the decree; but, if the case be proper for their interference, will specifically

to enforce the decree (o); though in other cases the court, and the House of Lords, upon an appeal, seem to have considered that the law of the decree ought not to be examined on a bill to carry it into execution (p). Such a bill may also be brought to carry into execution the judgment of an inferior court of equity (q), if the jurisdiction of that court is not equal to the purpose; as in the case of a decree in Wales which the defendant avoided by flying into England (r): but in this case the court thought itself entitled to examine the justice of the [97] 117 decision, though affirmed in the House of Lords (s).

original bill, and partly a bill in the nature of an

A bill for this purpose is, generally, partly an

1 Ves. 245; Johnson v. Northey, Prec. in Ch. 134; S. C. 2 Vern. 407. In the last case the lord keeper (1700) seemed to think that a bill by creditors to carry into execution a decree in favor of their debtor had opened that decree. In the case of Sir John Worden v. Gerard, in Ch. 1718, the interests of an infant party being affected by the decree, the court refused to carry it into execution upon a bill for that purpose, and made a decree according to the rights of the parties. See Lechmere v. Brasier, 2 Jac. & W. 287. But in Shephard v. Titley, 2 Atk. 348, on a bill to foreclose a mortgage, after a bill to redeem, on which a decree had been

(o) Att. Gen. v. Day, 1 Ves. 218; made, the bill of foreclosure insisting Ves. 245; Johnson v. Northey, on an encumbrance not noticed in the last case the lord keeper (1700) hearing ordered to stand over, that the question might be brought on by sto carry into execution a decree favor of their debtor had opened bill of review.

- (p) 2 Ves. 232; Smythe v. Clay, 1
 Bro. P. C. 453, Toml. Ed.; see also Minshull v. Lord Mohun, 2 Vern. 672, and S. C. on appeal, 6 Bro. P. C. 32, Toml. Ed.
 - (q) 1 Roll. Ab. 373.
- (r) Morgan v. —, 1 Atk. 408. The case referred to of a decree in Wales seems to have been a case of Halford v. Morgan.
 - (s) See Douglas, 6.

execute the decree. There are cases where the rule has been relaxed and the decree varied, if, upon examining the proofs taken in the cause wherein the decree was made, or the directions given, a mistake has been discovered. Este et al. v. Strong et al., 2 Ohio R. 419, 418, condensed from 2 Hammond, 401.

original bill, though not strictly original (t); and sometimes it is likewise a bill of revivor, or a supplemental bill, or both. The frame of the bill is varied accordingly.

7. Original bills in the nature of

7. It has been already mentioned (u), that when bills of revivor. the interest of a party dying is transmitted to another in such a manner that the transmission may be litigated in this court, as in the case of a devise, the suit cannot be revived by or against the person to whom the interest is so transmitted; but that such person, if he succeeds to the interest of a plaintiff, is entitled to the benefit of the former suit; and if he succeeds to the interest of a defendant, the plaintiff is entitled to the benefit of the former suit against him; and that this benefit is to be obtained by an original bill in nature of a bill of revivor (1). A bill for this purpose must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted: and it must charge the validity of the transmission, and state the rights which have accrued by it. The bill is said to be original merely for want of that privity of title between the party to the former and the party to the latter bill, though claiming the same interest, as would have permitted the continuance of the suit by a bill of revivor. Therefore, when the validity of the alleged transmission of interest is established, the party to the new bill shall

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(u) See above, p. 86.

⁽t) In case of Pott v. Gallini, a extended upon an original bill. 1 decree in a former suit was, in effect, Sim. & Stu. 206.

^{(1) [}See form of such bill, Willis, 394;] and the doctrine and practice in New-York, on abatement and revivor, pp. 69 and note, 83, note.

be equally bound by or have advantage of the proceedings on the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest (x); and the suit is considered as pending from the filing of the original bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross-bill, and every other advantage which would have attended the institution of the suit by the original bill if it could have been continued by bill of revivor merely (y).

8. It has been also mentioned (z), that if the in- 8. Supplemental bills in the nature of original terest of a plaintiff or defendant, suing or defen- bills. ding in his own right, wholly determines, and the same property becomes vested in another person not claiming under him, the suit cannot be continued by a bill of revivor, and its defects cannot be supplied by a supplemental bill; but that by an original bill in the nature of a supplemental bill the benefit of the former proceedings may be obtained (a). A bill for this purpose must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the ground upon which the court ought to grant the benefit of

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⁽x) Clare v. Wordell, 2 Vern. 548; 1 Eq. Ca. Ab. 83; Minshall v. Lord Mohun, 2 Vern. 672; Mordaunt v. Minshull, 6 Bro. P. C. 32, Toml. Ed.; Johnson v. Northey, Prec. in Cha. 134; S. C. 2 Vern. 407; 1 Sim. & Donegall, 1 Sim. & Stu. 491.

⁽⁴⁾ Child v. Frederick, 1 P. Wms.

⁽z) See above p. 86.

^{· (}a) See Houlditch v. Marquis of

the former suit to or against the person so become entitled; and pray the decree of the court adapted to the case of the plaintiff in the new bill (b). This bill, though partaking of the nature of a supplemental bill, is not an addition to the original bill, but another original bill, which in its consequences may draw to itself the advantage of the proceedings on the former bill (c) (1).

IV. Informations.

IV. Informations (d) in every respect follow the nature of bills, except in their style. When they concern only the rights of the crown, or of those whose rights the crown takes under its particular protection, they are exhibited in the name of the king's attorney or solicitor-general as the informant; and, as before observed, in the latter case always,

⁽b) 6 Bro. P. C. 24, Toml. Ed. 88. [See form of such a bill, Willis,

⁽c) See 9 Ves. 55, above, pp. 87, 396.]
(d) See above, pp. 21-24.

⁽¹⁾ Where a defendant dies, after putting in his answer, and devising his estate, which the bill seeks to affect, to persons who are not parties to the bill, the plaintiff may, in another bill against such defendant, his devisees and executors, and a surviving party to the first bill, state the allegations contained in the first bill, and may introduce various passages of the answer, by way of pretence or otherwise, and meet such passages by charges, without rendering the second bill impertinent. For, as to the repetition of the statements contained in the first bill, that is necessary in order to enable the fresh parties to understand the nature of the case made by the first bill, of the contents of which it must be assumed that they are ignorant. And as to the insertion of passages from the answer and charges to meet them, the plaintiff is entitled to the same advantage against the devisees and executors as if they had been parties to the original bill, in which case he might have amended the original bill by stating the defendant's answer by way of pretence, and inserting charges to meet it. The second bill above mentioned may be termed an original bill in the nature of a supplemental bill, it being original as to the fresh parties, but supplemental as regards the former bill. Woods v. Woods, 10 Sim. 193.

and in the former sometimes, a relator is named, who in reality sustains and directs the suit. It may happen that this person has an interest in the matter in dispute, and sustains the character of plaintiff as well as of relator; and in this case the pleading is styled an information and bill. An information concerning the rights of the queen is exhibited also in the name of her attorney-general. The proceedings upon an information can only abate by the death or determination of interest, of the defendant.

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If there are several relators, the death of any of them, while there survives one, will not in any degree affect the suit; but if all the relators die, or if there is but one, and that relator dies, the court will not permit any further proceeding till an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly (e), otherwise there would be no person liable to pay the costs (f) of the suit in case the information should be deemed improper, or for any other reason should be dismissed.

The difference in form between an information and a bill consists merely in offering the subject matter as the information of the officer in whose name it is exhibited, at the relation of the person who suggests the suit in those cases where a relator is named, and in stating the acts of the defendant to be injurious to the crown, or to those whose rights the crown thus endeavors to protect. When the pleading is at the same time an information and

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⁽e) Att. Gen. v. Powell, Dick. 355. And the application must be made by the attorney-general, or with his consent. Att. Gen. v. Plumptree, 5 Madd. 452; Wellbeloved v. Jones, 1 dleton, 2 Ves. 327.

Sim. & Stu. 40; and see Anon. Sel, Ca. in Cha. 69; Att. Gen. v. Fellows, 1 Jac. & W. 254.

⁽f) 1 Ves. 72; Att. Gen. v. Mid-

bill it is a compound of the forms used for each when separately exhibited (g).

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In this investigation of the frame and end of the several kinds of bills the matters requisite to the sufficiency of each kind have been generally considered; but they will in some degree be more particularly noticed in the following chapter, in treating of the defence which may be made to the several kinds of bills, and consequently of the advantages which may be taken of their insufficiency both in form and substance.

(g) It may here be observed, with respect to informations on behalf of public charities, that the practice of this court has been to control the governors or other directors of them, in those cases only in which they have had the disposition of its revenues; and that this limited authority has been exerted under its general jurisdiction in relation to trusts: although it has gone beyond the ordinary cases on that subject by regulating the exercise of their discretion. 2 Ves. 89 2 Ves. 328; Att. Gen. v. Foundling Hospital, 2 Ves. Jr. 42; S. C. 4 Bro. C. C. 165; Att. Gen. v. Dixie, 13 Ves. 519; Att. Gen. v. Earl of Clarendon, 17 Ves. 491; 3 Ves. & Bea. 154; Att. Gen. v. Brown, 1 Swanst. 265; Att. Gen. v. Mayor of Bristol, 3 Madd. 319; S. C. 2 Jac. & W. 294; Folcy v. Wontner, 2 Jac. & W. 245; Att, Gen. v. Buller, 1 Jac. R. 407; Att. Gen. v. Heelis, 2 Sim. & Stu. 67; Att. Gen. v. Mayor of Stamford, reported 2 Swanst. 591; Att. Gen. v.

Vivian, 1 Russ. R. 226. It has already been observed in the text, p. 19, that this court is empowered by the 52 Geo. III. c. 101, to interfere in such cases as relate only to the plain breach of trusts created for charitable purposes, on what is technically termed a petition in a summary way. As to which, see also Ex parte Berkhampstead School, 2 Ves. & Bea. 134; Ex parte Rees, 3 Ves. & Bea. 10; Ex parte Brown, Coop. R. 295; Ex parte Skinner, 2 Meriv. 453; S. C. 1 Wils. R. 14; Ex parte Greenhouse, 1 Swanst. 60; S. C. 1 Wils. R. 18; In re Slewings Charity, 3 Meriv. 707; Att. Gen. v. Green, 1 Jac. & W. 303; In re Bedford Charity, 2 Swanst. 470; in the matter of St. Wenn's Charity, 2 Sim. & Stu., 66, and see 2 Swanst. 518, 525. And it may here be added, that it is also authorized to decide in certain other cases relating to the property of charities, upon a petition, . by the 59 Geo. III, c. 91.

CHAPTER THE SECOND.

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OF THE DEFENCE TO BILLS.

SECTION I.

By whom a Suit may be defended.

In treating of the defence which may be made to a bill it will be proper to consider, I. By whom a suit may be defended. II. The nature of the various modes of defence; under which head will be considered, 1, demurrers; 2, pleas; 3, answers and disclaimers, or any two or more of them jointly, each referring to a separate and distinct part of the bill.

When the interest of the crown, or of those the attorney whose rights are under its particular protection, is or solicitor-general. concerned in the defence of a suit, the king's attorney-general, or during the vacancy of that office the solicitor-general, becomes a necessary party to support that interest (a); but it has been already observed, that a suit in the court of chancery is not the proper remedy where the crown is in possession, or any title vested in it is sought to be divested, or affected (b), or its rights are the immediate and sole object of the suit. The queen's attorney or solicitor seems to be the party necessary to defend her rights (c).

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⁽a) Balch v. Wastall, 1 P. Wms. (c) See 2 Roll. Ab. 213. But a 445; 2 Sch. & Lefr. 617.

⁽b) See above, p. 33.

queen dowager has been sued as a common person. 9 Hen. VI. 53.

Those who are suit alone.

Those who are

All other bodies politic and corporate (1), and persons who do not partake of the prerogative of the crown, and have no claim to its particular protection, defend a suit either by themselves, or under the protection of or jointly with others (1). Bodies politic and corporate, and persons of full age, not being married women, or idiots or lunatics, defend a suit by themselves; but infants, idiots and lunatics, are incapable by themselves of defending as they are of instituting a suit; and married women can only defend jointly with their husbands, except under particular circumstances, unless a special order is obtained to authorize or compel their defending separately.

Infants

Infants institute a suit by their next friend; but to defend a suit the court appoints them guardians, who are usually their nearest relations, not concerned in point of interest in the matter in question (d) (2). If a person is by age or infirmities, reduced to a

and persons in a second child-

dowager of Henry IV.

(d) Offley v. Jenney, 3 Ch. Rep. ants, see Brassington v. Brassing-

Writ of annuity against Joan, queen 51. On the subject of appointing guardians ad litem for infant defend-

⁽¹⁾ See p. 10, note: It there appears that where an officer of a corporation is made defendant for the purpose of discovery merely, no relief should be prayed against him; none general nor special; and the prayer of the bill should be so framed that it will distinctly appear that all the relief sought is intended to be confined to the other defendants and that none will be asked against such officer at the hearing, even as to costs. If there is a general or special prayer for relief which is applicable to the officer of the corporation as well as to other defendants, he is entitled to put in an answer containing a full defence; otherwise he might be surprised at the hearing by an application for costs or for some other relief against himself or his property upon grounds which he might have fully obviated by his answer. Mc Intyre v. Trustees of Union College and E. Nott, 6 Paige's R. 242-3, 239.

^{(2) [3} Bibb, 525: Bedell's heirs v. Lewis's heirs, 4 J.-J. Marshall's R. 567; 2 Revised Statutes, N. Y. 186, § 122, 123, 124; Ib. 317, § 4;

second infancy, he may also defend by guardian(e).

Idiots and lunatics defend by their committees (f) Idiots and lunatics. who are by order of the court appointed guardians [104]

ton, 3 Anstr. 369; Eyles v. Le Gros, 9 Ves. 12; Jongsma v. Pfiel, 9 Ves. Chan. 229; 1 Eq. Ca. Ab. 281; 357; Williams v. Wynn, 10 Ves. Wilson v Grace, 14 Ves. 172; and 159; Hill v. Smith, 1 Madd. R. 290; see Att. Gen. v. Waddington, 1 Lushington v. Sewell, 6 Madd. 28, sed vide Tappen v. Norman, 11 Ves. 563.

- (e) Leving v. Caverly, Prec. in Madd. R. 321.
- (f) 1 Vern. 106; Lyon v. Mercer, 1 Sim. & Stu. 356.

Rules N. Y. Chancery, 143, 145, 146, 147, 148, 149; Knickerbacker v. De Freest, 2 Paige's C. R. 304. As to partition cases, see 2 R. S. 329, § 80, 81; Larkin v. Mann, 2 Paige's C. R. 27; Wilkinson v. Parish, 3 Ib. 653.

It is error to enter a decree against infant defendants, without assigning them a guardian ad litem. Curtis's heirs v. Ellis, 3 A. K. Marshall's R. 77; Iron's executors v. Crist, Ib. 143; Jones v. Lacey, 3 J. J. Marshall, 544; Roberts v. Stanton, 2 Munf. 129. And although the infancy does not appear in the original proceedings, yet if it be alleged in a petition for a rehearing (the decree being interlocutory) a guardian ad litem must be appointed. Roberts v. Stanton, supra.

It is presumed that, if an infant defendant were to appear and defend by solicitor, a complainant might compel an appearance and defence by guardian. This has been done at common law. Hindmarsh v. Chandler, 7 Taunt. 488. Infants cannot be made parties to a bill for the sake of discovery merely, as they do not answer on their oaths. Leggett v. Sellon, 3 Paige's C. R. 84. No decree or order of revival can be made against an infant, by default, under the provisions of the New-York Revised Statutes. But if the infant neglects to appear 'and procure the appointment of a guardian, the same steps for the appointment of a guardian ad litem must be taken as in other cases where the infant neglects to appear. Wilkinson v. Parish, 3 Paige's C. R. 653. In a controversy between the superseded and substituted guardian as to the effects of the ward, such ward must be a party. Campbell v. Williams, 3 Monroe's R. 125.

It has never been the course and practice of the court to appoint a guardian to an infant feme covert. Matter of Whittaker, 4 J. C. R. 379, and cases there cited; Roach v. Garvan, 1 Ves. sen. 157.

A suit does not abate by the infant's coming of age. No change is necessary in the proceedings. Cur. Can. 464; Cary 22.]

for that purpose as a matter of course (g); and if it happens that an idiot or a lunatic has no committee (h), or the committee has an interest opposite to that of the person whose property is intrusted to his care (i), an order may be obtained for appointing another person as guardian for the purpose of defending a suit (k). So if a person who is in the condition of an idiot or a lunatic, though not found such by inquisition, is made a defendant, the court upon information of his incapacity will direct a guardian to be appointed (l) (1).

(g) Westcomb v. Westcomb, Dick. Lloyd v. —, Dick. 460.
233. (k) Howlett v. Wilbraham, 5

(h) Howlett v. Wilbraham, 5 Madd. 423.

Madd. 423. (l) Anon.

(l) Anon. 3 P. Wms. 111, note; see

(i) Snell v. Hyat Dick. 287; see Wilson v. Grace, 14 Ves. 172.

(1) [And see Howlett v. Wilbraham, 5 Ves. Jr. 423, where on a motion of a complainant, a lunatic defendant had a guardian appointed to put in an answer. And see Carter v. Carter, 1 Paige's C. R. 463.

It is an almost universal rule, that the lunatic need not be made a party defendant with his committee. The suit should be against the latter as committee. Executors of Brasher v. Van Cortlandt, 2 J. C. R. 242; Teal v. Woodworth, 3 Paige's C. R. 470; and see in the matter of Heller, Ib. 199. Although a person has been found a lunatic abroad, yet upon his leaving his country for another, a commission would have to issue within the latter country, before he could be brought before the court as in ordinary cases. Matter of Houstoun, 1 Russ. C. R. 312.

A committee must be appointed for a non-resident lunatic, to enable such committee to obtain the control of property within the jurisdiction of the court. Matter of Pettit, 2 Paige's C. R. 174; Ex parte Baker, Coop. C. C. 205.

It is doubtful how far the insolvency of a committee will be a sufficient cause for removing him as a party and actor. Ex parte Mildmay, 3 Ves. Jr. 2; Ex parte Proctor, 1 Swanst. 532; Ex parte Livingston, 1 J. C. R. 434.

It would seem, that where there is a joint appointment of two as committee, and one dies, a fresh appointment must take place. Ca. Temp. Talbot, 143; but see Ex parte Picard, 3 V. & B. 127; Exparte Lyne, Forrest, 143.

A married woman, though she cannot by herself Married women. institute a suit, and if her husband is not joined with her must seek the protection of some other person as her next friend, may yet, by leave of the court, defend a suit separately from her husband without the protection of another (m). Thus, if she claims in opposition to any claims of her husband, or if she lives separate from him (n), or disapproves the defence he wishes her to make (o), she may obtain an order for liberty to defend the suit separately (p), and her answer may be read against her (q). If a husband is plaintiff in a suit, and makes his wife a defendant, he treats her as a feme sole, and she

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- Feme, I. a. 20; 1 Sim. & Stu. 163. order for the purpose may be sup-254.]
- 75; Jackson v. Haworth, 1 Sim. & taken by her merely for want of Stu. 161.
- 2 Eq. Ca. Ab. 66.
- Hardw, 258; Wybourn v. Blunt, Sel. Ca. in. Cha. 24. Dick. 155. A separate answer put

(m) 4 Vin. Ab. 147, Baron and in by a married woman without an [Barry v. Cane, 3 Madd. R. 472; pressed as irregularly filed. But if Ormsby v. White, 1 Hogan's C. R. filed with her approbation, and accepted by the plaintiff, it will not be (n) Portman v. Popham, Tothill, deemed irregular upon objection the order for leave to file it separate-(o) Ex parte Halsam, 2 Atk. 50; ly; and she will be bound by an offer contained in it. See Duke of Chan-(p) Powell v. Prentice, Ca. t. dos v. Talbot, 2 P. Wms. 371; S. C.

(q) Travers v. Buckly, 1 Ves. 383.

Where the property is small, a party in the situation of a lunatic has been allowed to answer by guardian, without the appointment of a committee. Ex parte Picard, supra; Anonymous, cited in [B.] 3 P. Wms. 111; Eyre v. Wake, 4 Ves. Jr. 795; Wilson v. Grace, 14 Ves. Jr. 171.

Where, after a decree in a suit, in which a lunatic and his committee are defendants and the committee dies and a new one is appointed, a motion should be made for an order that the latter be named as the committee in all the future proceedings in the cause. Lyon v. Mercer, 1 Sim. & Stu. 356,

The committee of a lunatic, who has voluntarily accepted the appointment, cannot be discharged without showing some valid excuse for resigning his trust. In the matter of Lytle, 3 Paige's C. R. 251.]

may answer separately without an order of the court for the purpose (r), The wife of an exile, or of one who has abjured the realm, may defend as she may sue alone (s); and if a husband is out of the jurisdiction of the court (t), though not an exile, or if he cannot be found (u), his wife may be compelled to answer separately (1). If a married

- (r) Ex parte Strangeways, 3 b. 133, a.; and 2 Vern. 105.

 Atk. 478; Brooks v. Brooks, Prec. (t) Carlton v. M. Enzie, 10 Ves. in Chan. 24; Ainslie v. Medlicott, 442; Bunyan v. Mortimer, 6 Madd. 13 Ves. 266.
 - (s) See page 24, 19 Co. Litt. 132, (u) Bell v. Hyde, Prec. in Ch. 328.

It is not a ground for the wife's answering alone that her husband is in prison. Anonymous, 2 Ves. Jr. 332; and see *Duke of Chandos* v. *Talbot*, 2 P. Wms. 371.

If a female defendant marry and neglect or refuse to disclose the fact, so that her husband might be regularly brought before the court, the cause may proceed without regard to marriage. *Hartly* v. O'Flaherty, 1 Mol. 5; and see *Thorold* v. Hay, Dick. 410.

If a married woman be of unsound mind and deserted by her husband, and she is a defendant in a suit, an order must be obtained, which of course for her putting in her answer separate from her husband, having had a guardian appointed her. 1 Grant's Pr. 354.

Where a woman was abandoned by her husband, and could get no person to be her guardian, she was allowed to file her answer without one. Glover v. Young, Bunb. 167.

Where a feme sole answers, and afterwards, pendente lite, marries, the plaintiff may proceed against her without reviving, and the hus-

^{(1) [}An order must be obtained for a wife to answer separately before she can do so. A husband may obtain this order where he cannot influence his wife to answer; and where the husband is abroad and not amenable to the jurisdiction, the complainant may obtain the order. And it is doubtful whether, in either case, the husband can answer separately before there is an order that the wife shall put in a separate answer. The practice, however, seems to be to receive his answer. And yet, if it were not a case in which an order might be obtained for the wife to answer separately, she must answer jointly; and then his answer, if on file, must be taken off, in order that she may join it. Garey v. Whittingham, supra. The wife becomes a substantial party to a suit, only from the time of the order that she should answer separately. Jackson v. Haworth, supra.

woman obstinately refuses to join in defence with her husband, she may also be compelled to make a separate defence; and for that purpose an order may be obtained that process may issue against her separately (x). Except under such circumstances a married woman can only defend jointly with her husband (y).

296; 1 Sim. & Stu. 163.

woman, see further, Plomer v. Plomer, 1 Ch. Rep. 68; Wrottesley v. Bendish, 3 P. Wms. 235; Penne v. Peacock, Ca. t. Talb. 41; Murriett v. Lyon, Bunbury, 175; Ex parte

(x) Pain v. -, 1 Ca. in Cha. Halsam, 2 Atk. 50; Traverse v. Buckley, 1 Wils. R. 264; Barry v. (y) As to the answer of a married Cane, 3 Madd. 472; Jackson v. Haworth, 1 Sim. & Stu. 161; Garey v. Whittingham, 1 Sim. & Stu. 163; Bushell v. Bushell, 1 Sim. & Stu.

band shall be bound by the answer she made while sole. 296, (6th edit.;) and see Cary, 81.]

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CHAPTER II.

SECTION II.—PART I.

Of the Nature of the various Modes of Defence (1) to a Bill; and first of Demurrers.

Four modes of It has been mentioned (a) that the person against whom a bill is exhibited, being called upon to answer the complaint made against him, may defend himself, 1. By demurrer, by which he demands the judgment of the court whether he shall be compelled to answer the bill or not (b). 2. By plea, whereby he shows some cause why the suit should be dismissed, delayed, or barred (c). 3. By answer, which controverting the case stated by the plaintiff, confesses and avoids, or traverses and de-

(a) Pages 14, 15, 16, 17.

(c) Ibid. 324, Wy. Ed.

(b) Pract. Reg. 162, Wy. Ed.

(1) [See a neat synopsis of the different modes of defence in equity opposite to page 319, in Lubé on Pleading.]

The rules of pleading are founded in good sense, and are more simple than the rules of special pleading in an action at law. But the forms and rules of pleading both in suits at law and in courts of equity, are to be strictly observed, otherwise great laxity of pleading may follow and the object of the rules would be defeated. But as the most learned and careful pleader in the hurry of business may make mistakes in mere matters of form, amendments are allowed with great liberality, and without costs, unless the opposing party is thereby prejudiced; and thus any hardship which a party might otherwise suffer by mistakes in matters of form which have no bearing on the merits of the case may be avoided. (Wright v. Dame, 22 Pick. R. 58, 55.)

But in pleading matters of substance in equity, it was held in Burdit v. Grew, 8 Id. 111, 108, that the same strictness is required as at law.

But see p. [295] note, infra.

nies, the several parts of the bill (d); or, admitting the case made by the bill, submits to the judgment of the court upon it, or upon a new case made by the answer, or both; or by disclaimer, which at once terminates the suit, the defendant disclaiming all right in the matter sought by the bill (e). all or any of these modes of defence may be joined, provided each relates to a separate and distinct part of the bill (1).

It has also been observed that the grounds on various grounds of defence. which defence may be made to a bill, either by answer, or by disputing the right of the plaintiff to compel the answer which the bill requires, are va-Different rious both in their nature and in their effect. Some frame to the same bill. of them, though a complete defence as to any relief, are not so as to a discovery; and when there is no

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(d) 2 West. Symb. Chan. 194; (e) Pract. Reg. 175, Wy. Ed. Pract. Reg. 11, Wy. Ed.

⁽²⁾ If any part of the bill is good and entitle plaintiff to relief or discovery a demurrer to the whole cannot be sustained. It is an established and universal rule of pleading in chancery that a defendant may meet a complainant's bill by several modes of defence. He may demur, answer and plead to different parts of the bill; so that if a bill for a discovery contain proper matter for the one and not for the other. defendant should answer the proper and demur to the improper matter; and if he demur to the whole bill the demurrer must be overruled. Livingston v. Story, 9 Peters 657. [658,] 632. But the several defences must each refer to and profess in terms to be put in as a defence to separate and distinct parts of the bill. (Leacraft v. Demprey, 4 Paige R. 125, 124.) Defendant cannot plead and demur, answer and demur to the whole or some part of the bill. [Clark v. Phelps, 6 Johns. C. R. 214; Beauchamp v. Gibbs, 1 Bibb, 481.] See infra [212,] [300].

In Massachusetts the subject is regulated by express rules. R. 21, 28, see 24 Pick. 417, 415.

In New-York the pleadings on part of defendant are now limited to two, demurrer and answer. See code of procedure.

ground for disputing the right of the plaintiff to the relief prayed, or if the bill seeks only a discovery, yet if there is any impropriety in requiring the discovery, or if it can answer no purpose for which a court of equity ought to compel it, the impropriety of compelling the discovery, or the immateriality of the discovery if made, may be used as a ground to protect the defendant from making it. Different grounds of defence therefore may be applicable to different parts of a bill; and every species of a bill requiring its own peculiar ground to support it, and its own peculiar form to give it effect, a deficiency in either of these points is a ground of defence to it.

Nature and general causes of a demurrer.

Whenever any ground of defence is apparent on the bill itself (1), either from matter contained in it,

Demurrer grounded on an allegation which does not pressly allege the fact on which the demurrer is grounded.

(1) Allowing that a demurrer, founded on the Ship Registry Acts, would hold to a bill respecting a ship, if the bill alleged that the ship was British built; an allegation that the ship was built by a builder described to be of a particular place in this country, is not a sufficient allegation to ground upon it such a demurrer; because the ship may have been built by that builder in some other part of the world. v. Small, 14 Sim. 119.

Inconsistent statements.

But where two inconsistent statements are made in a bill, a defendant is entitled, upon demurrer, to adopt that which is most against the plaintiff's interest. So that where the plaintiff would have no right to institute the suit, as issue in tail, and the bill sets forth the limitations of a settlement in such a manner as to show that the plaintiff's father is tenant for life, with remainder to the plaintiff as tenant in tail, but subsequent parts of the bill speak of the father as tenant in tail, and of the plaintiff as heir in tail; the defendant is entitled, on demurrer, to treat the bill as stating that the plaintiff is issue in tail, and not as tenant in tail. Vernon v. Vernon, 2 My. & C. 145. to an inference on demurrer, see same case.

False allegation foreign country.

And when a plaintiff founds his case upon the allegation that a of recognition of foreign country is recognised by the English government as an independent state, and that allegation is false, the judge is bound to know judicially that it is false, and to allow a demurrer depending on its falsity. For it is the duty of the judge in every court to take notice of

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or from defect in its frame, or in the case made by it, the proper mode of defence is by demurrer. (1) A demurrer is an allegation of a defendant, which, admitting the matters of fact (f) alleged by the bill to be true (2), shows that as they are therein set

(f) A demurrer confesses matter 2 Ves. & B. 95; 3 Meriv. 503; Cuthof fact only, and not matter of law. bert v. Creasy, 6 Madd. 189. [Pry-Lord Raym. 18; 1 Ves. Jr. 78, 289; or v. Adams, Call's R. 391.]

public matters which affect the government of the country; and the courts of the sovereign should act in unison with the government of the sovereign. Taylor v. Barclay, 2 Sim. 213.

(1) [Harris v. Thomas, 1 Hen. & Munf. 18; Alderson v. Riggars, 4 lb. 472.]

(2) See note to original page [211], infra. [A demurrer to a bill must be founded on some dry point of law, which goes to the absolute denial of the relief sought; and not on circumstances in which a minute variation may incline the court either to grant, or modify, or refuse the application. Verplanck v. Caines, 1 J. C. R. 57.] It admits all material allegations on every charge or fact, well pleaded, not every thing stated. Smith v. Allen et al., Saxton C. R. N. J. 52, 43; Goble v. Andruss et al., 1 Green C. R. 76, 66, 71 Arg.

Its office is to bring before the court the right to maintain the bill upon the admission pro hac vice of the entire truth of all its allegations, and the court cannot look aliunte, to search out or conjecture what other facts might or did exist to defeat it; for this is the office of a plea or answer. Ocean Insurance Co. v. Fields, 2 Story Rep. 77, 59.

[A demurrer is the negation of the rule of law laid down in the first proposition of the bill, namely, that the right to discovery and relief results from the relation assumed; or, rather since the causes of demurrer must be assigned, (Beames' Ord. Chan. 77, 173,) it is a negative proposition, that from the complainant's own showing, he has not the right to discovery and relief, either, because the relation stated by him is not adequate, or, because there are some of the objections to answering apparent on the face of the bill. Thus, an issue in law is joined, not in the first instance on the complainant's right, but on the validity of the causes assigned; and if any of these causes be allowed on argument, the right is necessarily gone. The statement of the causes of demurrer, therefore, will be nothing more than a reference to the bill and an enumeration of the objections appearing on the face of it, on which the defendant means to rely. Hence arises two questions:—Whether the objection, as stated, really exists? and whether such ob-

forth they are insufficient for the plaintiff to proceed

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upon or to oblige the defendant to answer (g); or that for some reason apparent on the face of the bill (h), or because of the omission of some matter, which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands the judgment of the court whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof (i). The causes of demurrer are merely upon matter in the bill (k), or upon the omission (l) of matter which ought to be therein or attendant thereon; and not upon any foreign matter alleged by the defendant (m). The principal ends of a demurrer are, to avoid a discovery which may be prejudicial to the defendant, to cover a defective title, or to prevent unnecessary expense. If no one of these ends is obtained, there is little use in a demurrer. (1) For, in general, if a demurrer would hold to a bill, the court, though the defendant answers, will not grant relief upon hear-

Ends of a demurrer.

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jection is valid? The first is, generally, a question of the adequateness of the relation stated by the bill; the latter is a question on the rule of law: and the defendant should, in assigning the causes of demurrer, clearly point out the nature of the objection which he takes, and how it appears on the adverse pleading. Lube, 338, 339, 340.]

ing the cause. There have been, however, cases

⁽g) Prac. Reg. 162, Wy. Ed.

⁽h) Ord. in Cha. 26, Ed. Bea.

⁽i) 3 P. Wms. 80; Prac. Reg. 162, Wy. Ed.; see 2 Sch. & Lefr. 206.

⁽k) 2 Ves. 247.

⁽l) 3 P. Wms. 395.

⁽m) Ord. in Cha. 26, Ed. Bea.

^{(1) [}Therefore, a bill praying for a receiver is not, on that account, demurrable, as the appointment of one rests in the sound discretion of the court. Verplanck v. Caines, 1 J. C. R. 57.

in which the court has given relief upon hearing, though a demurrer to the relief would probably have been allowed (n). But the cases are rare.

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Bills have been already considered under three order of treatment has day 1 original bills and 1 general heads; 1, original bills; 2, bills not original; and, 3, bills in the nature of original bills. The several kinds of bills ranged under the second and third heads being consequences of bills treated of under the first head, the defence which may be made to original bills in its variety comprehends the several defences which may be made to every other kind of bill, except such as arise from the peculiar form and object of each kind. In treating therefore of demurrers it will be convenient first to consider demurrers to original bills, under which head the nature of demurrers in general, and the principal grounds of demurrer to every kind of bill, will be necessarily noticed: the distinct causes of demurrer peculiar to the several other kinds of bills will be then

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(n) 3 P. Wms. 150; 12 Mod. 171, or confessed, a decree would then be (1). It seems that the court, upon made. See 2 Ves. Jr. 97; Brook v. the argument of a demurrer, decides upon the facts as stated in the bill, whether if the cause were to proceed to a hearing, and they were proved

Hewitt, 3 Ves. 253; 6 Ves. 686; 7 Ves. 245; 2 Sch. & Lefr. 638; 6 Madd. 95 (2).

(1) And see Ludlow v. Simond, on appeal, 2 C. C. E. I.

⁽²⁾ In Underhill v. Van Cortlandt, 2 J. C. R. 339, an objection was made at the hearing, after answer, that the remedy was at law. The court said-" At any rate, by answering in chief, instead of demurring, "the defendants submitted the cause to the cognizance of this court, "and they come too late, at the hearing on the merits, to raise the ob-"jection, It would be an abuse of justice, if the defendants were to "be permitted to protract a litigation to this extent, and with the ex-" pense that has attended this suit, and then, at the final hearing, inte-"pose this preliminary objection." And see Grandin v. Leroy 2 Paige's C. R. 509; U. S. v. Sturges, 1 Paine's C. C. R. 526; and Hawley v. Cramer, 4 Cowen, 717.]

mentioned; and in the third place will be considered the frame of demurrers in general, and the manner in which their validity is determined.

In treating of original bills they have been divided into bills praying relief, and bills not praying relief; and it has been mentioned that both require a discovery from the party against whom the bill is exhibited. Demurrers to original bills may therefore be considered under two heads: first, demurrers to relief, which frequently include a demurrer to discovery; and secondly, demurrers to discovery only, which sometimes consequentially affect the relief. Under these heads will necessarily be considered the causes of demurrer, as well to bills which seek a discovery only as to such as likewise pray relief.

[110] Specific grounds of demurrer to relief.

From what has been observed in a preceding page it may be collected that the principal grounds of objection to the relief sought by an original bill, which can appear on the bill itself, and may therefore be taken advantage of by demurrer, are these (o); I. that the subject of the suit is not within the

(o) It has been said that a defend- bill may be dismissed. Anon. Mosely, a very small sum; but it is most Taylor, 2 Atk. 253. (1) usual to apply to the court that the

ant may demur to a bill if it appears 47, 356; Anon. Bunbury, 17; Owens upon the face of it to be brought for .y. Smith, Comyn, 715; Brace v.

^{(1) [}And see 2 R. S. 173; Moore v. Ly'tle, 4 J. C. R. 183; Fullerton v. Jackson, 5 lb. 276; Douw v. Sheldon, 2 Paige's C. R. 303; Vredenburgh v. Johnson, 1 Hopk. 112; Mitchell v. Tighe, Ib. 119; Hamilton v. Johnson, Vern. & Scriv. 394.

It is said, that the value of the matter in demand which determines the jurisdiction of the court, is to be ascertained by the claim made by the complainant in his bill, and not by the finding of the court. Skinner v. Bailey, 7 Day's R. 496; Judd v. Bushnell, Ib. 205. A justice's judgment, where the amount is \$100 and upwards, is as well entitled

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jurisdiction of a court of equity; II. that some other court of equity has the proper jurisdiction; III. that the plaintiff is not entitled to sue by reason of some personal disability; IV. that he has no interest in the subject, or no title to institute a suit concerning it: V. that he has no right to call on the defendant concerning the subject of the suit; VI. that the defendant has not that interest in the subject which can make him liable to the claims of the plaintiff; VII. that for some reason founded on the substance of the case, the plaintiff is not entitled to the relief he prays. To these may be added, VIII. the deficiency of the bill to answer the purpose of complete justice: and IX. the impropriety of confounding distinct subjects in the same bill, or of unnecessarily multiplying suits. When the discovery sought by a bill can only be assistant to the relief prayed, a extend to the discovery. ground of demurrer to the relief will also extend to the discovery; but if the discovery may have a further purpose, the plaintiff may be entitled to it

to the aid of a court of equity as the judgment of a court of record. Bailey v. Burton, 8 Wendell's R. 339. Several judgment creditors, the joint amount of whose judgments is \$100 or upwards, may unite in a bill for discovery and to remove impediments at law created by the fraud of their common debtor. Ib. A bill of discovery to aid a suit at law, although the sum in controversy is under \$100, will be sustained in the court of chancery of the State of New-York. Golder v. Becker, 1 Edwards' V. C. R. 271.] Schroeppel v. Redfield, 5 Paige R. 246, 245. Before the abolition of that court in New-York, defendant might demur or move to dismiss with costs, if it appeared on the bill that the subject in controversy was beneath the jurisdiction. If it did not appear he must, to avail of the objection, bring it up by his pleadings. The proper averment of the bill would be in the language of the statute, "that the value of the defendants equitable interests, &c., exceeds, or is more than \$100." Bradt v. Kirkpatrick, 7 Paige's R. 62-4; Smets v. Williams, 4 Id. 365, 364.

[111] though he has no title to relief. In considering, therefore, these several grounds of demurrer to relief, such as may, and such as cannot, extend to discovery likewise, will be distinguished.

I. Want of jurisdiction.

Where the jurisdiction is exercised.

I. The general objects of the jurisdiction of a court of equity (1) have been noticed in a former page (p); and from thence it may be collected, that the jurisdiction, when it assumes a power of decision, is to be exercised, (1), where the principles of law, by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose; 2, where the courts of ordinary jurisdiction are made instruments of injustice; 3, where the principles of law by which the ordinary courts are guided give no right, but upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent: and it may also be collected that courts of equity without deciding upon the rights of the parties, administer to the ends of justice by assuming a jurisdiction; 4, to remove impediments to the fair decision of a question in other courts; 5, to provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having

(p) Pages 4, 5.

⁽¹⁾ The reader is referred generally to the Treatises on the subject of Equity Jurisprudence or Jurisdiction, as to this part of Lord Redesdale's Treatise, extending from this page to page [151], inasmuch as it belongs to that subject rather than to the subject of Equity Pleadings, and embraces a very wide field.

immediate but partial interests; 6, to restrain the assertion of doubtful rights in a manner productive of irreparable damage; 7, to prevent injury to a third person by the doubtful title of others: and 8, to put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits: and further, that courts of equity, without pronouncing any judgment which may affect the rights of parties, extend their jurisdiction; 9, to compel a discovery, or obtain evidence which may assist the decision of other courts; and 10, to preserve testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation.

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1. Cases frequently occur in which the principles 1. To supply a complete remediate (q) by which the ordinary courts are guided in their a legal right, in administration of justice give a right, but from accident or fraud, or defect in their mode of proceeding, those courts can afford no remedy, or cannot give the most complete remedy; and sometimes the effect of a remedy attempted to be given by a court

the case of

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(q) The existence of courts of equity in England distinct from the courts of ordinary jurisdiction, has suggested an idea that the ordinary courts, and especially the courts of common law, have not in their administration of justice any recourse to such principles of decision as are merely rules of equity. But in fact those principles have been as constantly applied by the ordinary courts as by the courts of equity (1), except where they have clashed with established rules of the common law, and where the forms observed in the pro-

ceedings of the ordinary courts have not admitted of the application: And from time to time the courts of common law have also been induced to admit, as grounds of their decision, rules established in the courts of equity, which they had before rejected as clashing with established rules of the common law; and for some purposes they have also noticed principles of decision established in the courts of equity, which the forms of proceeding in the courts of common law have not enabled them directly to enforce.

⁽¹⁾ See Smith's "Manual of Equity Jurisprudence," Introd. Sect. I.

of ordinary jurisdiction is defeated by fraud or accident. In such cases courts of equity will interpose to give those remedies which the ordinary courts would give if their powers were equal to the purpose, or their mode of administering justice could reach the evil; and also to enforce remedies attempted to be given by those courts when their effect is so defeated.

lost bonds,

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Thus where an instrument on which a title is founded, as a bond, is lost, a court of equity will interfere to supply the defect occasioned by the accident, and will give the same remedy which a court of common law would have given if the accident had not happened (r) (1). If an instru-

(r) 1 Ca. in Cha. 11; 1 Eq. Ca. Company v. Boddam, 9 Ves. 464; Ab. 92; 1 Atk. 287; Anon. 2 Atk. Seagrave v. Seagrave, 13 Ves. 439; 61; Anon. 3 Atk. 17; J. Ves. 344; Smith v. Bicknell, 3 Ves. & B. 51, n. 5 Ves. 238; 7 Ves. 19; East India Stokoe v. Robson, 3 Ves. &. B. 51.

If bill founded on loss of deed or instrument be not sustained by affidavit, it is demurrable. If party failed to demur, but answer over to the bill, or allowed it to be taken as confessed, it seems the absence of the affidavit is not sufficient for reversal of the decree. Findley et al. v. Hinde and wife, 1 Peters 244.

See the reasons why an affidavit is required in England or in equity courts of general jurisdiction; and why the rule does not apply in Massachusetts. Campbell v. Sheldon, 13 Pick. R. 19, 20, 8.

^{(1) [}See the form of a bill for relief where a bond is lost, Willis, 13. A bill will lie by the last endorsee of a lost bill of exchange to recover the amount from the acceptor; and prior endorsees need not be made parties to the suit. Macartney v. Graham, 2 Sim. 28; and see Davies v. Dodd, 4 Price, 176. So the court has jurisdiction of bill to recover against endorsers of a lost note. The foundation of chancery jurisdiction in such cases, is, it seems, the power to compel indemnity. Indemnity against the re-appearance of the note must be offered in the bill, and forms part of the decree. It need not be tendered before bill filed. Affidavit of the loss accompanies the bill. Smith et al. v. Walker et al., 1 Smedes & Marshall (Miss.) Ch. R. 432; see Sooks' Administrator v. Friend's Administrator, 9 Ohio R. 78,

ment has been destroyed, or is fraudulently sup-instruments destroyed, suppressed, or withheld from the party claiming under held, it, courts of equity will also give relief (s) (1); as they will generally lend their aid whenever by fraud or accident a person is prevented from effectually asserting in the courts of ordinary jurisdiction rights founded on principles acknowledged by those courts (2).

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In some instances courts of law have acted on the supposed destruction or suppression of an instrument, where formerly those courts conceived they could not act for want of the instrument, especially in the particular mode of proceeding. Thus in the case of a supposed suppression or destruction of a lease for lives under a power in a settlement, the supposed lessee was permitted to obtain on parol testimony a verdict and judgment in ejectment, upon a feigned demise, the form of the proceeding not requiring the lease in question to be in any manner stated in the pleadings, so that it could not appear upon the record under what title the recovery was had, or what specific lands were in the supposed lease, what were the lives for which it was granted, what the rent reserved, or what covenants bound either party; or whether the lease was or was not according to the powers

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(s) See Lord Hunsdon's case, Hob. Wms. 720; Atkins v. Farr, 1 Atk.

^{109;} Eyton v. Eyton, 2 Vern. 380; 287; Tucker v. Phipps, 3 Atk. 359; Sanson v. Rumsey, 2 Vern. 561; 1 Ves. 392; Saltern v. Melhuish, Dalston v. Coatsworth, 1 P. Wms. Ambl. 249; Bowles v. Stewart, 1 731; Cowper v. Earl Cowper, 2 P. Sch. & Lefr. 209.

^{(1) [}See the form of a bill where an instrument has been fraudulently withheld from the party claiming it. Willis, 27.]

⁽²⁾ See note to p. 132.

under which it was alleged to have been made. The consequence necessarily was a suit in equity to have all those facts ascertained, and to restrain the execution of the judgment in ejectment in the mean time (1).

waste,

In restraining waste (1), by persons having limited interests in property, the courts of equity have generally proceeded on the ground of the common-law rights of the parties, and the difficulty of obtaining immediate preservation of property from destruction or irreparable injury by the process of the common law (t) but upon this subject the jurisdiction has been extended to cases in which the remedies provided in those courts could not be made to apply (u).

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Where an act of parliament has expressly given

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(t) See Field v. Jackson, Dick. 599; Davis v. Leo, 6 Ves. 784; Smith v. Collyer, 8 Ves. 89; 9 Ves. 356; 19 Ves. 154. (2)

(u) As to the instances where the title is legal, and the courts of law admit the existence of an injury, but do not afford a remedy, see 2 Freem. 54; Perrot v. Perrot, 3 Atk. 94; 3 Atk. 210; Farrant v. Lovell, 3 Atk. 723; 3 Atk. 755, 756; Mollineux v. Powell, 3 P. Wms. 268, n.; 3 Bro. C. C. 544; Onslow v. ——, 16 Ves. 163; Pratt v. Brett, 2 Madd. R. 62; Brydges v. Stephens, 6 Madd. 279; as to those where the title is equita-

ble, see 19 Ves. 151, 155; and as to those where the injury is not acknowledged at law, which are cases of equitable waste, see Chamberlyne v. Dummer, 1 Bro. C. C. 166; S. C. Dick. 600; Marquis of Downshire v. Sandys, 6 Ves. 107; Lord Tamworth, v. Lord Ferrers, 6 Ves. 419; Williams v. M. Namara, 8 Ves. 70; Burges v. Lamb, 16 Ves. 174; Day v. Merry, 16 Ves. 375; Marchioness. of Ormonde v. Kynersley, 5 Madd. 369; Lushington v. Boldero, 6 Madd. 149; Coffin v. Coffin, 1 Jac. R. 70 (3).

⁽¹⁾ See note to p. 132.

[[]See the form of a bill to restrain waste by persons having limited interests in property. Willis, 39; Equity Draft. 458. (2d edit.)

^{(2) [}Brashear v. Macey, 3 J. J. Marshall's R. 93. This bill is the only remedy which a complainant has, when he is entitled to a contingent interest which may never vest. Ib.; and see note (u) above.]

^{(3) [}See the cases on waste amplified in Jeremy's Eq. Jur. 327.]

a right, the courts of ordinary jurisdiction have been found incompetent to give, in all cases, a full and complete remedy, and the courts of equity have therefore interposed (1). Thus in the case insolvent debtof a person who had been discharged under an act for relief of insolvent debtors, by which his future effects were made liable to the demand of his creditors, but his person was protected; the court of chancery, exercising its extraordinary jurisdiction, enforced a judgment of a court of common law against his effects, which were so circumstanced as not to be liable to execution at the common law. (x) (2).

Every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts. Edmeston v. Lyde, 1b. 637.

⁽x) Edgell v. Haywood, 3 Atk. 352. See 1 Jac. & W. 371. (3)

⁽¹⁾ See note to p. 132.

⁽²⁾ See the form of a bill, Willis, 45.]

^{(3) [2} R. S. 173; Williams v. Brown, 4 J. C. R. 687; Brinkerhoff v. Brown, 1b. 671; Hidden v. Spader, on appeal, 20 J. R. 554; S. C. 5 J. C. R. 280: M'Dermutt v. Strong, 4 J. C. 687; Beck v Burdett, 1 Paige's C. R. 305; Gandler v. Petit, Ib. 168; Edmeston v. Lyde, Ib. 637; Stillwell v. Van Eps, Ib. 615; Erger v. Price, 2 Ib. 334; U. S. v. Sturges, 1 Paine's C. C. R. 525; M'Elwain v. Willis, on appeal. 9 Wendell's R. 543; Le Roy v. Rogers, 3 Paige's C. R. 234; Practice in Ohio Chancery, Acts of 1831, vol. 29, p. 84, § 16. A judgment in the court of the United States is not sufficient to ground a bill for reaching property of a debtor not subject to execution. It stands upon no other ground than the judgments of courts of sister states. Tarbell v. Griggs, 3 Paige's C. R. 207. A creditor's bill cannot be filed until after the return day of the execution is gone by; and its issuing and return must be set forth. Cassidy v. Meacham, 3 Paige's C. R. 311. Creditors by judgment and decree may join in such a bill. Clarkson v. De Peyster, lb. 320. An omission of the averments required in a creditor's bill, by the 189th rule of the court of chancery of the State of New-York, is good ground of demurrer. M'Elwain v.

rent.

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Where parties by contract have given a right, but have not provided a sufficient remedy, the courts of equity have also interfered (1). Thus where a rent was settled upon a woman by way of jointure, but she had no power of distress, or

The judgment is prima facie evidence against the debtor or mere strangers. Garland v. Rives, 4 Randolph's R. 282.]

Independent of statute in New-York, the court of Errors in Hadden v. Spader, 20 Johns R. held that a judgment creditor whose execution was returned unsatisfied, might come into chancery to reach an interest of debtor in property which could not be sold under execution at law. Farnham v. Campbell, 10 Paige R. 601, 598. And the object of that statute was to establish and declare the great principle decided in that case. Gleason v. Gage, 7 Id. 123.

The bill may be filed on execution unsatisfied, although complainant has brought a suit on that judgment and recovered a new judgment thereon in another state. Bates v. Lyons, 7 Paige's R. 85, 86; contra, Mitchell v. Bunce, 2 Id. 606, overruled. The opinion that the second extinguished or merged the first judgment, as intimated in Mitchell v. Bunce, was wrong.

If the judgment on which execution is unsatisfied is assigned, the assignee may file the bill, without taking out new execution. He need not state in the bill the particulars of the consideration of the assignment which, being under seal, imports consideration. Gleason v. Gage, 7 Paige's R. 123-4, 121; contra, Wakeman v. Russell, 1 Edw. C. R. 509, which was a misapprehension of the statute on creditors' bills.

When an insolvent debtor assigns his property to defraud his creditor, or fraudulently releases a debt, a judgment creditor who has exhausted his remedy at law, may, notwithstanding such voluntary assignment file his bill to reach the property in the hands of the fraudulent vendee or recover the debt so released. And the voluntary assignee of the insolvent debtor, acquired no right to recover the debt which had been so fraudulently assigned. Brownell v. Curtis, 10 Paige's R. 218, 219, 217, 210, 211: contra, Bayard v. Hoffman, 4 Johns. C. R. 450, in which case it is supposed that the chancellor overlooked the distinction between a voluntary assignment by the fraudulent grantor and one by operation of law under the bankrupt acts.

In New-York by the code of procedure, a judgment creditor has now a simpler method of reaching his debtor's property, than by filing a bill, after execution returned unsatisfied. Code § 247, et seq.

(1) See note to p. 132.

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other remedy at law, the payment, according to the intent of the conveyance, was decreed in equity (y). So where parties, meaning to create a imperfectinperfect title, have used an imperfect instrument, as a feoffment without livery of seisin (z) (1), a bargain and sale without enrolment (a); a surrender of copyhold not presented according to the custom of the manor (b); courts of equity have considered the imperfect instrument as evidence of a contract for making a perfect instrument, and have remedied the defect even against judgment creditors (c) who had gained a lien in the land in question, though when the consideration has been inadequate, relief has not been extended so far (d). Where the legislature has declared that an instrument wanting in a particular form should be null and void to all intents and purposes, and it was manifestly the design of the legislature that those words should operate to the fullest extent, relief has been refused. Thus a bill of sale of a ship wanting a formality required by the Register Act was not made good in equity against assignees of the vendor become bankrupt (e).

Relief has also been given where a remedy at law was originally provided, but by subsequent accident boundaries,

⁽y) Plunket v. Brereton, 1 Ch. Rep. 5; and see Duke of Leeds v. Powell, 1 Ves. 171.

⁽z) Burgh v. Francis, cited 1 P. Wms. 279; Burgh v. Burgh, Rep. t. Finch, 28.

⁽a) 6 Ves. 745.

⁽b) Taylor v. Wheeler, 2 Vern. 564.

⁽c) See 1 P. Wms. 279.

⁽d) Finch v. Earl of Winchelsea, 1 P. Wms. 277, 283.

⁽e) Hibbert v. Rolleston, 3 Bro. C. C. 571; 6 Ves. 745; Speldt v. Lechmere, 13 Ves. 588; Thompson v. Leake, 1 Madd. R. 39.

^{(1) [}See the form of a bill to remedy a defective deed, Willis 55.]

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chattels of peculiar value,

could not be enforced; as where by confusion of boundaries of lands, remedy by distress for rent was defeated (f) (1). So if the remedy afforded by the ordinary courts is incomplete, a court of equity will lend its aid to give a complete remedy (g) (1). Upon this ground a bill was admitted for recovery of an ancient silver altar claimed by the plaintiff as treasure trove within his manor: for though he might have recovered at law the value in an action of trover, or the thing itself, if it could be found, in an action of detinue, yet as the defendant might deface it, and thereby depreciate the value, it was determined that the defect of the law in that particular ought to be supplied in equity (h). And where an estate was held by a horn, and a bill was brought by the owner of the estate to have the horn delivered to him, a demurrer was overruled (i).

deeds and writings,

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Upon the same principle (k) the jurisdiction of the court is supported in the very common case of a bill for delivery of deeds or writings (l) (1), suggesting that they are in the custody or power of the defendant; though in early times it seems to have been consi-

(f) 1 Ves. 172. See North v. Earl and Countess of Strafford, 3 P. Wms. 148; Bouverie v. Prentice, 1 Bro. C. C. 200, and Duke of Leeds v. Corporation of New Radnor, 2 Bro. C. C. 338; S. C. ib. 518, and the cases there cited.

- (g) See 9 Ves. 33.
- 3 P. Wms. 390; and see Fells v. 41 B. and Stat. 32 Hen. VIII. c. 36.

Read, 3 Ves. 71; Lowther v. Lord Lowther, 13 Ves. 95.

- (i) Pusey v. Pusey, 1 Vern. 273; and see Earl of Mucclesfield v. Davis, 3 Ves. & Bea. 16.
 - (k) See 2 Atk. 306.
- (1) The court of chancery has long exercised its extraordinary jurisdic-(h) Duke of Somerset v. Cookson, tion in this case See 9 Edw. IV.

⁽¹⁾ See note to p. 132.

[[]See the form of a bill in such a case, Willis 69.]

dered that the jurisdiction did not extend to cases where an action of detinue would lie (m).

In the case of contracts or agreements this prin-specific per-formance. ciple is carried to the extent (1). The principles by which the courts of common law direct their decisions on the subject acknowledge the mutual right of the contracting parties to specific performance of the agreements they have made; but the mode of proceeding in those courts enables them only to attempt to compel performance by giving damages for non-performance. Here therefore the courts of equity interfere to give that remedy which the ordinary courts would give if their mode of administering justice would reach the evil, by decreeing, according to the principles of the common law as well as of natural justice, specific performance of the agreement (n) (2). This however extends only to contracts of which a specific performance is essential to justice (o); for if damages for non-performance are all that justice requires, as in the case of

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v. Brown, Dick. 62; 1 Madd. R., 192; Crow v. Tyrrell, 3 Madd. 179; Knye v. Moore, 1 Sim. & Stu. 61; Batch v. Symes, 1 Turn. 87.

(m) 9 Edw. IV. 41 B.; see also 39 Hen. VI. 26; Brooke Prær. 45; which seems to have been in effect a bill for discovery and account.

Lefr. 556; 1 Jac. & W. 370. The courts of equity decree performance of agreement in many cases where

s. 9: and see on this subject Brown no action would lie at the common law for non-performance; and on this head great complaints have been made, the justice of which it is beyond the purpose of this treatise to consider. See 1 Fonbl. Treat. of Eq. 151, n. (c), and 2 Sch. & Lefr. 347, and Williams v. Steward, 3 Meriv. 472. As to the propriety of extend-(n) 13 Ves. 76, 228; 2 Sch. & ing the application of the doctrine of part performance, see 3 Ves. 712, 713; 6 Ves. 32, 37; 2 Sch. & Lefr. 5.

(o) See 3 Bro. C. C. 543; 8 Ves.

⁽¹⁾ See note to p. 132.

^{(2) [}See bills to compel the specific performance of an agreement, Willis, 83; Equity Draft. 9, 11, et. seq.]

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a contract for stock in the public funds, a court of equity will not interfere (p). In other cases where compelling a specific act is the only complete remedy for an injury, and the ordinary courts can attempt to give this remedy only by giving damages, the courts of equity will interfere to give the specific remedy, especially if the right has been established by the determination of the ordinary courts (q).

In some cases, as in matters of account (r) (2),

163; 2 Sch. & Lefr. 347. (1)

(p) Cud v. Rutter, 1 P. Wms.570; 10 Ves. 161; 13 Ves. 37.

(q) It is difficult to reconcile all the cases in which the courts of equity have compelled the performance of agreements, or refused to do so, with each other; and in some cases where performance has been decreed, it is difficult to reconcile the decisions with the principles of equal justice. The cases and their varieties are numerous, and have been ably collected in 1 Fonbl. Treat. of Equity. Of the later cases on the subject, see Morphett v. Jones, 1 Swanst. 172; S. C. 1 Wils. Ch. R. 100; Garrard v. Grinling, 2 Swanst.

1, 244; S. C. 1 Wils. Ch. R. 460; Walker v. Barnes, 3 Madd. 247; Hudson v. Bartram, 3 Madd. 440; Franklyn v. Tuton, 5 Madd. 469; Dawson v. Ellis, 1 Jac. & W. 524; Baxter v. Conolly, 1 Jac. & W. 576, Martin v. Mitchell, 2 Jac. & W. 413; Beaumont v. Dukes, 1 Jac. R. 422; Gordon v. Smart, 1 Sim. & Stu. 66; Bryson v. Whitehead, 1 Sim. & Stu. 74; Doloret v. Rothschild, 1 Sim. & Stu. 590; Lingen v. Simpson, 1 Sim. & Stu. 600; Agar v. Maclew, 1 Sim. & Stu. 418; Hasker v. Sutton, 2 Sim. & Stu. 513; Lewin v. Guest, 1 Russ. R. 325; Attwood v. ____, 1 Russ. R. 353.

(r) See 2 Ves. 388; Corporation

So, after considerable lapse of time, unless upon very special circumstances. Even where time is not of the essence of the contract, courts of equity will not interfere, where there have been long delay and latches, on the part of the party seeking a specific performance. And especially, will they not, where there have been a great change of circumstances, and new interests intervened. Holt v. Rogers, 8 Peters, 433, 420.

^{(1) [}Catheart v. Robinson, 5 Peters, 264. In Hepburn v. Dunlap, 1 Wheat. 179, it is said, that, generally speaking, a court of law is competent to afford an adequate remedy to either party to a breach of contract, from whatever cause it may have proceeded; and that whenever this is the case, a resort to a court of equity is improper.]

⁽²⁾ See note to p. 132. [Hawley v. Cramer, 4 J. C. R. 717.]

partition of estates between tenants in common (s), account, partition, and assignment of dower (t) (2), a court of equity near of dower. will entertain jurisdiction of a suit, though a remedy might perhaps be had in the courts of common law (3). The ground upon which the courts of equity first interfered in these cases seems to have been the difficulty of proceeding to the full extent of justice in the courts of common law (u). Thus though accounts may be taken before auditors in an action of account in the courts of common law, yet a court of equity by its mode of proceeding is enabled to investigate more effectually long and intricate accounts in an adverse way, and to compel payment of the balance whichever way it turns (4).

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1 Sch. & Lefr. 309.

570; Turner v. Morgan, 8 Ves. 143; 17 Ves. 552; 1 Ves. & B. 555; Mil-484 (1).

(t) See Curtis v. Curtis, 2 Bro. vent multiplicity of suits.

of Carlisle v. Wilson, 13 Ves. 276 C. C. 620; 2 Ves. Jr. 129; 17 Ves. 552. [Powell v. The Monson and (8) See 2 Freem. 26; 2 Ves. J. Brimfield Manufacturing Co., 3 Mason, 378.]

(u) 2 Ves. 388; 13 Ves. 279. ler v. Warmington, 1 Jac. & W. Perhaps in some of these cases the jurisdiction was first assumed to pre-

^{(1) [}Jeremy's Eq. Juris. 303. Equity has concurrent power in partition. Parmers v. Respass, 5 Munroe, 564; Wisely v. Findlay, 3 Randolph, 361; 2 Revised Statutes N. Y. 329 to 332; Harwood v. Kirby, 1 Paige's C. R. 469; Jenkins v. Van Schaick, 3 Ib. 242. Chancery is the proper tribunal for tenants in common of personal estate: for they can have no partition of it at common law. Smith v. Smith, 4 Randolph's (Virginia) R. 95. Partition suits in the court of chancery of the State of New-York may be commenced by bill or partition. Larkin v. Mann, 2 Paige's C. R. 27. For a slight history of the English and New-York Statutes relating to partition, see Gallatian v. Cunningham, 8 Cowen's R. 362.]

^{(2) [}See the form of a bill for dower. Willis, 110; Equity Draft. 212, (2d edit.)]

^{(3) [}Moses v. Lewis, 12 Price, 509.]

⁽⁴⁾ A bill for an account is not demurrable merely because the plain. Omission of an tiff does not offer to account at all, or does not offer to account for as offer to account.

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In the case of partition of an estate (1), if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partitions, which are effected by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required, and upon return of the commission, and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties (x). But if the infancy of any of the parties, or other circumstances, prevent such mutual conveyances, the decree can only extend to make the partition, give possession, and order enjoyment accordingly

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(x) Cartwright v. Pultney, 2 Atk. 380; 2 Sch. & Lefr. 372; 1 Jac. & W. 493. (1)

much as he ought to account for; for he may be made to account to the full extent of what is just, although he does not even admit himself to be an accounting party. Clark v. Tipping, 4 Beav. 588.

Offer in a bill for an account of rents received

If a bill is filed for an account of the rents and profits received by the grantee of an annuity, who, in consequence of its being in arrear, by an annuitant. is in possession of the premises demised to secure the annuity, the bill must contain an offer either to redeem on the terms of the annuity deed, or to re-purchase upon equitable terms to be settled by the court. Knebell v. White, 2 Y. & C. Eq. Ex. 15.

(1) See note to p. 132.

(2) [See Warfield v. Gambrill, 1 Gill & Johns. 503. If the title of the complainant in a particular suit is denied or it depends upon doubtful facts or questions of law, a court of equity will either dismiss the bill or retain it until the right is decided at law. Stranghan v. Wright, 4 Randolph's (Virginia) R. 493; S. P. in cases of dower, Wells v. Beall, 2 Gill & Johns. 468; Wilkin v. Wilkin, 1 J. C. R. 111; Phelps v. Green, 3 Ib. 302; Cox v. Smith, 4 Ib. 271. A mere reversioner without the concurrence of all the owners, cannot have a partition. Striker v. Mott, 2 Paige's C. R. 387.]

until effectual conveyances can be made (1). If the defect arise from infancy, the infant must have a day to show cause against the decree after attaining twenty-one; and if no cause should be shown, or cause shown should not be allowed, the decree may then be extended to compel mutual conveyances (y). If a contingent remainder, not capable of being barred or destroyed, should have been limited to a person not in being, the conveyance must be delayed until such person shall come into being, or until the contingency shall be determined; in either of which cases a supplemental bill will be necessary to carry the decree into execution. An executory devise may occasion a similar embarrassment (z).

In the case of dower (3) the widow is often much embarrassed in proceeding upon a writ of dower at the common law, to discover the titles of her deceased husband to the estates out of which she claims her dower, to ascertain their comparative value, and obtain a fair assignment of a third. How far the courts of equity will assist a widow in the assignment of dower has been at different times a subject of much question; but the result of various decisions seems to have settled, that where there is no ground of equity, as a purchase for valuable consideration (a), to prevent their interference, the courts will proceed to set out dower; though if the

(z) See the case of Wills v. Slade, C. 264.

 ⁽y) See Att. Gen. v. Hamilton, 1 6 Veg. 498. (2)
 Madd. R. 214.
 (a) Williams v. Kambe, 3 Bro. C.

^{(1) [}And see Sears v. Hyer, 1 Paige's C. R. 483.]

⁽²⁾ Also, Striker v. Mott, 2 Paige's C. R. 387; Cheeseman v. Thorne, 1 Edwards' V. C. R. 629.

⁽³⁾ See note to p. 132.

[122] title to dower be disputed, it must be first established at law (b).

In all these cases the courts of equity will lend their aid; but they have generally considered themselves in so doing as proceeding merely on rights which may be asserted in a court of common law, and therefore in the two cases of partition, and assignment of dower, as no costs can be given in a court of common law upon a writ of partition or a writ of dower, no costs have been commonly given in a court of equity upon bills brought for the same purposes (c); and as arrears of dower can be recovered at common law only from demand, the same rule was adopted in the courts of equity, unless particular circumstances had occurred to warrant a departure from the course of the common law, founded on the terms of a statute (d). The courts of

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(b) Curtis v. Curtis, 2 Bro. C. C 620; Mundy v. Mundy, 2 Ves. Jr. 122. The last case was upon a demurrer, which after much consideration was overruled. Lord Talbot had overruled a demurrer under similar circumstances in Moor v. Blake, 26 July, 1735, reported Ca. Temp. Talb. 126, by the name of Moore and Black. And a like decision was made in Meggott v. Meggott, in Cha. 15 Oct. 1743. But in Read v. Read, 15 Dec. 1744, the court retained the bill, and ordered the deeds to be produced, with liberty to the plaintiff to bring a writ of dower, which was also done in Curtis v.

•Curtis, 15 May, 1778; finally reported in 2 Bro. C. C. 620. See also the case of D'Arcy v. Blake, 2 Sch. & Lefr. 387.

- (c) Lucas v. Calcraft, Dick. 594.
 With respect to costs in cases of partition, see Calmady v. Calmady, 2 Ves. Jr. 568; Agar v. Fairfax, 17
 Ves. 533; 1 Ves. & Bea. 554; (1) and in cases of dower, see Lucas v. Calcraft, 1 Bro. C. C. 134, and S. C. 1 Ves. & Bea. 20, note; 2 Ves. 128; Worgan v. Ryder, 1 Ves. & Bea. 20 (2).
- (d) In the case of Curtis v. Curtis,2 Bro. C. C. 620, this rule was not observed.

^{(1) [2} Revised Statutes of N. Y. 327, § 62; Ib. 329, § 79; Phelps v. Green, 3 J. C. R. 302; Matter of Hemiup, 3 Paige's C. R. 305.]

^{(2 [}Willis' Eq. Pl. 110, note (a); Tabele v. Tabele, 1 J. C. R. 45; Hazen v. Thurbur, 4 lb. 604; Russell v. Austin, 1 Paige's C. R. 192; Johnson v. Thomas, 2 lb. 377.]

equity having gone the length of assuming jurisdiction in a variety of complicated cases of account, of partition, and of assignment of dower, seem by degrees to have been considered as having on these subjects a concurrent jurisdiction (d) with the courts of common law in cases where no difficulty would have attended the proceedings in those courts.

But except in these instances, and in some cases General rule as to jurisdiction. noticed in a subsequent page, the courts of equity will not assume jurisdiction where the powers of the ordinary courts are sufficient for the purposes of justice; and therefore, in general, where a plaintiff can have as effectual and complete remedy in a court of law as in a court of equity, and that remedy is clear and certain (e), a demurrer, which is in truth a demurrer to the jurisdiction of the court, will hold (f) (2).

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(d) 13 Ves. 279; 1 Sch & Lefr. all right to decide upon the validity of wills, whether of real or of personal estate, a demurrer to a bill, whereby such a determination is sought, will hold. See Jones v. Jones, 3 Meriv. 161; Jones v. Frost, 3 Madd. 1; S. C. 1 Jac. R. 466 (1).

The court of chancery of the state of New-York is authorized to take proof of wills lost. 2 R. S. 67.]

^{309; 1} Ves. & Bea. 555.

⁽e) Parry v. Owen, 3 Atk. 740; Ghettoff v. Lond. Assur. Comp. 4 Bro. P. C. 436, Toml. Ed.; 1 Eq. Ca. Ab. 131; Bensley v. Burdon, 2 Sim. & Stu. 519.

⁽f) As courts of equity disclaim

⁽¹⁾ Segrave v. Kirwan, 1 Beatty's R. 163. The duty of chancery is merely to construe the effect of a will. Ib. It is not competent for a court of chancery to set aside a will or codicil as to real estate on the ground of fraud or incompetency of the testator. The question should be determined in a court of law on an issue from chancery of devisavit vel non. It is otherwise as to a will of personal estate. Rogers v. Rogers, on appeal, 3 Wendell's R. 503; and see Colton v. Ross, 2 Paige's C. R. 369, where it is said, that the court of chancery has no original jurisdiction to try the validity of wills of personal estate. The jurisdiction of the court existing only in case of an appeal from the decision of the surrogate.

⁽²⁾ See Smith's Manual of Equity Jurisprudence, Introd. sec. 1.

Affidavit necessary in support of a bill founded ment.

If an accident is made a ground to give jurison a lost instru- diction to the court in a matter otherwise clearly cognizable in a court of common law, as the loss

> A demurrer to a bill for cause that the complainant has a legal remedy, will not be entertained, unless that remedy appears clear and not doubtful or difficult. O'Brien v. Irwin, Ridg. Lap. & Scho. 361; and see Reed v. Bank of Newburgh, 1 Paige, 215.

Legal rights are to be asserted by legal means; and in such cases, courts of equity never lend their aid when equity and justice do not imperiously demand it. Bosley v. M'Kinn, 7 Harris & Johns. R. 160. Although chancery will not reverse a judgment at law, nor decide over again a point decided by a court of law, yet it will hear the same subject of controversy, upon grounds not litigated in the court of law, either for want of legal testimony, (which, in chancery, may be supplied by the oath of the party,) or because it was a subject of equity jurisdiction and not admissible at law, or perhaps for other causes; and perpetually enjoin a judgment. And this too, although the grounds, at the time of an injunction, may be considered cognizable at law, if if they were not so considered when the judgment was rendered and the bill brought. Dana v. Nelson, 1 Aiken's (Vermont) R. 252. After a cause has been fully heard and decided at law, there can be no relief in equity. Terrel v. Dick, 1 Call's (Virginia) R. 191; and see Moses v. Lewis, 12 Price's R. 502. Not even though the judge may have misapprehended the law. Brickell v. Jones, 2 Hayward's (North Carolina) R. 357; Marine Ins. Co. of Alexandria v. Hodgson, 7 Cranch, 332.

It seems, that relief will be given against a mistake of the attorney in pleading a plea which does not cover the defence. M'Neish v. Stewart, 7 Cowen's (New-York) R. 474. But, query this-see Graham v. Stagg, 2 Paige's C. R. 321.

A party who had a judgment against him at law, without having had notice of the proceeding which led to it, reimbursed upon his having been compelled to pay too much. Taylor v. Wood's executors, 2 Hayw. 332. Excessive damages at law are no grounds, in an ordinary case, for relief in equity. Reed v. Clark, 4 Monroe's (Kentucky) R. 19. The neglecting a defence at law, gives the party no right in equity. Drewry v. Barnes, 3 Russ. 94; More v. Bagley, 1 Breese's (Illinois) R. 60; Beaugenon v. Turcotte, Ib. 126; Hubbard v. Hobson, Ib. 147; Greenup v. Brown, Ib. 193; Loud v. Sergeant, 1 Edwards' V. C. R. 164.

Where a cause has been argued in a court of law, on a case settled and judgment rendered, chancery will not interfere to have the case or want of an instrument on which the plaintiff's title is founded, the court will not permit a bare suggestion in a bill to support its jurisdiction; but require a degree of proof of the truth of the circumstance on which it is sought to transfer the jurisdiction from a court of common law to a court of equity (g),

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(g) Whitchurch v. Golding, 2 P. Wms. 541; 3 Atk. 132.

amended and re-argued. Holmes v. Remsen, 7 J. C. R. 286. A judgment cannot be impeached, except for fraud or accident (unmixed with any fault or negligence in the complainant or his agent); nor can its consideration be inquired into. French v. Shotwell, 6 J. C. R. 235; Marine Ins. Co. of Alexandria v. Hodgson, 7 Cranch, 332. It will never interfere with the judgment on the ground of irregularity. The record of the judgment and execution and title under them are a conclusive bar in equity. Shottenkirk v. Wheeler, 3 J. C. R. 275. S. P. De Reimer v. Cantillon, 4 lb. 85; Hawley v. Mancius, 7 lb. 174.

A bill cannot be filed to recover the amount of a total loss on a policy of insurance on the ground that the policy had been assigned to the complainants by the assured, and that the assurers refused to pay. A demurrer would hold. Carter v. United Insurance Co., 1 J. C. R. 463.]

After defendant has answered and submitted to the jurisdiction it is too late to object to the jurisdiction on ground of adequate and complete remedy at law. If the court has jurisdiction of the subject matter in dispute, any other objection to the jurisdiction should be made without delay and at the earliest opportunity. First Congregational Society in Raynham et al. v. The Trustees of the Fund, &c. in Raynham, 23 Pickering R. Mass. 153, 148, citing Ludlow v. Simond, 2 Caines' Cas. 46.

An objection to the jurisdiction on ground that complainant has a perfect remedy at law should be by demurrer or in the answer. If improper and untrue allegations are inserted in a bill for the purpose of preventing a demurrer and to give apparent jurisdiction to a court of equity, the defendant may by his answer deny these allegations and insist that as to the other matters, the complainant has a remedy at law, although such objection in the answer will not save the necessity of a full discovery as to all the matters charged in the bill, it will at the hearing be sufficient to prevent complainant from obtaining his relief. Where objection is made in answer, complainant proceeds at peril of costs if objection is sustained at hearing. Fulton Bank v. New-York & Sharon Canal Co., 4 Paige R. 131-2, 127.

by an affidavit of the plaintiff annexed to and filed with the bill. Thus if a bill is brought to obtain the benefit of an instrument upon which an action at law would lie, alleging that it is lost, and that the plaintiff cannot therefore have remedy at law, an affidavit of the loss must be annexed to the bill, or a demurrer will hold (h).

or a bill for a discovery of an instrument.

So in the case of a bill for discovery of any instrument, suggesting that it is in the custody or power of the defendant, and praying any relief which might be had at law if the instrument was in the hands of the plaintiff, an affidavit must be annexed to the bill that the instrument is not in his custody or power, and that he knows not where it is, unless it is in the hands of the defendant (2). But if the relief sought extends merely to the delivery of the instrument, or is otherwise such as

(h) See Walmsley v. Child, 1 Ves. 342; Hook v. Dorman, 1 Sim. & Stu. 227 (1).

⁽¹⁾ As where the bill was for discovery of the contents of a lease and for partition, no affidavit was annexed that complainant had not the lease or counterpart in his custody or power, it was held that defendant is bound only to look to the copy of bill served on his solicitor and if it do not contain the requisite affidavit or verification to give the court jurisdiction, he may demur on that ground. Lansing v. Pine, 4 Paige's R. 641, 639.

[[]See the form of such a demurrer, Willis, 431. And see, as to the principle, Livingston v. Livingston, 4 J. C. R. 294; and see Laight v. Morgan, on appeal, 1 J. C. 429; S. C. 2 C. C. E. 344; Lynch v. Willard, 6 J. C. R. 342, 346; and, as to the sufficiency of such an affidavit, Le Roy v. Veeder, on appeal, 1 J. C. 417; S. C. 2 C. C. E. 175.

When a bill is filed for a discovery and also for relief, the bill being good for the former purpose, without affidavit, but not for the latter, it will be retained as for the sound part; and the defendant ought to answer the part which is good, and demur, if he thinks proper, to the other. Laight v. Morgan, 2 Caines' Ca. 344; S. C. 1 J. C. 429.]

^{(2) [}Laight v. Morgan, 1 C. C. E. 345; S. C. 1 J. C. R. 9.]

can only be given in a court of equity, such an affidavit is not necessary (i). It is also unnecessary in the case of a bill for discovery of a cancelled instrument, and to have another deed executed (k); for if the plaintiff had the cancelled instrument in his hands, he could make no use of it at law, and indeed the relief prayed is such as a court of equity only can give.

A suggestion that the evidence of the plaintiff's demand is not in his power is essential to a bill under these circumstances; and if it is defective in this point, the defendant may by demurrer allege that there is no such charge in the bill (l).

Where a right of action at law was in a trustee, Where a trustee and the person beneficially entitled filed a bill for his cestui que trust to bring an relief, suggesting a refusal by the trustee to suffer action in his an action to be brought in his name, a demurrer has been allowed (m); and if a mere suggestion to this effect would support a bill, the jurisdiction in many cases might improperly be transferred from a court of law to a court of equity.

By demurring to a bill because the plaintiff may have remedy at law, the defendant will not be debarred of relief in equity upon another bill, if the plaintiff in the first bill should proceed at law and recover (n).

> (m) Ghettoff v. Lond. Assur. Comp. 4 Brown, P. C. 436, Toml.

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⁽i) Whitworth v. Golding, Mos. 192; Nels. Rep. 78; Anon. 3 Atk. 17. (k) King v. King, Mos. 192.

⁽l) 3 P. Wms. 395 (1).

Ed. And see 1 Atk. 547 (2). (n) Humphreys v. Humphreys, 3 P. Wms. 395.

^{(1) |} See the form of such a demurrer, Willis, 433.]

^{(2) [}See the form of such a demurrer, Willis, 434; and note (g) there.]

This objection to a bill is not confined to cases

Objection that some other court than a court of common law has jurisdiction.

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cognizable in courts of common law. If any other court of ordinary jurisdiction, as an ecclesiastical court, court of admiralty, or court of prize, is competent to decide upon the subject, a demurrer will equally hold (1); except that the courts of equity have in the case of tithes, and in the disposition of the effects of persons dying testate or intestate, assumed a concurrent jurisdiction with the ecclesiastical courts, as far as the jurisdiction of those courts extends; and indeed the courts of equity in many of these cases can give more complete remedy than can be afforded in the ecclesiastical courts, and in some cases the only effectual remedy.

Bill to enforce the judgments of courts of ordinary jurisdiction.

Courts of equity will also lend their aid to enforce the judgments of courts of ordinary jurisdicdiction (2); and therefore a bill may be brought to obtain the execution or the benefit of an elegit (o), or a fieri facias (p), when defeated by a prior title, either fraudulent, or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In some cases, where courts of equity formerly lent their aid, the legislature has by express statute provided

⁽o) Lewkener v. Freeman, Pr. in (p) Smithier v. Lewis, 1 Vern. Cha. 105; Higgins v. York Build. 399; Balch v. Wastall, 1 P. Wms. Comp. 2 Atk. 107; Stileman v. Ash-445. down, 2 Atk. 608.

^{(1) [}See the form of such a demurrer, Willis, 467; and note (a) there.]

⁽²⁾ See note to p. 132. Infra p. [187]. [The court of Chancery of the state of New-York may enforce contribution between owners of lands subject to judgment. 2 Revised Statutes, 376.]

for the relief of creditors in the courts of common law; and consequently rendered the exertion of this jurisdiction in such cases unnecessary. In any case to procure relief in equity, the creditor must show by his bill that he has proceeded at law to the extent necessary to give him a complete title. Thus in the cases alluded of an elegit and fieri facias he must show that he has sued out the writs the execution of which is avoided, or the defendant may demur (q); but it is not necessary for the plaintiff to procure returns to those writs (r).

The judgments of the ecclesiastical courts giving civil rights will receive the same aid from a and the judg-ments of the ecclesiastical court of equity as those of the courts of common courts. law (3); and therefore where a person against whom there was a sentence in an ecclesiastical court at the suit of his wife for alimony, intended to avoid the execution of the sentence by leaving the kingdom, the court of chancery entertained a bill for a writ of ne exeat regno, to restrain him from leaving the kingdom until he had given security to pay the maintenance decreed (s).

⁽q) (1) Angell v. Draper, 1 Vern. 398; Shirley v. Watts, 3 Atk. 200

⁽r) Manningham v. Lord Bolingbroke, Elegit, Easter, 1777, in Chan .: Kennard v. Moore, in Chan. June 23,

But see Balch v. Wastall, 1 P. Wms.

⁽s) Read v. Read, 1 Ca. in Cha. 115; Sir Jerom. Smithson's case, 2 Ventr. 345; Anon. 2 Atk. 210; Ambl. 76; Shaftoe v. Shaftoe, 7 1756; 2 Eq. Ca. Ab. 251; King v. Ves. 171; Dawson v. Dawson, ib. Marissal, 3 Atk. 192; S. C. ib. 200. 173; Oldham v. Oldham, ib. 410; Haffey v. Haffey, 14 Ves. 261.

^{(1) [}See the form of such a demurrer, Willis, 470; and also note (b) there, and notes to page 115, ante.]

^{(2) [}U. S. v. Sturges, 1 Paine's C. C. R. 525; and see note to page

^{(3) [}A creditor by decree in chancery, upon the return of his exe-

150 2. To prevent the other courts from being made an instrument of

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injustice:

2. Sometimes a party, by fraud, or accident, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction which must necessarily make that court an instrument of injustice; and it is therefore against conscience that he should use the advantage (1). In such cases, to prevent a manifest wrong, courts of equity have interposed, by restraining the party whose conscience is thus bound from using the advantage he has improperly gained; and upon these principles bills to restrain proceedings in courts of ordinary jurisdiction are still frequent, though the courts of common law have been enabled, by the assistance of the legislature, as well as by a more liberal exertion of their inherent powers, to render applications of this nature to a court of equity unnecessary in many cases where formerly no other remedy was provided. Thus if a deed is fraudulently obtained without consideration, or for an inadequate consideration, or if by fraud, accident or mistake (2), a deed is framed contrary to the in-

as in cases of fraud, mistake, accident, and oppression.

cution unsatisfied, is entitled to the same relief against the equitable interests and property of his debtor as a creditor by a judgment at law. Clarkson v. De Peyster, 3 Paige's C. R. 320.

(1) See note to p. 132.

^{(2) [}Yelton v. Hawkins, 1 J. J. Marshall's R. 2; Parcels v. Gohegan, Ib. 133; Burdett v. Simons, 3 Ib. 192; Hyne's Representatives v. Campbell, 6 Monroe's R. 287; Baugh v. Ramsey, 4 Ib. 157, 158; Barrett v. Floyd, 3 Call's R. 465; Rosevelt v. Fulton, 2 Cowen's R. 129; Lyon v. Richmond, 2 J. C. R. 51; Gillespie v. Moon, Ib. 585. But if a defence has been made at law and the consideration investigated, equity will not interfere. Yelton v. Hawkins, supra. It cannot interfere further than to correct a mistake in the amount of a judgment obtained without fraud. Ib. If a note is, by mistake, executed for too large a sum, it is a ground for relief in equity. Money paid by mistake, and as excessive interest, may be recovered back by bill. Ashbrook v. Watkins,

tention of the parties in their contract on the sub-

3 Monroe's R. 82. A judgment which has been obtained through mistake of the defendant at law will not be relieved against, if proper steps could have been taken. Farmers' Bank v. Vanmeter, 4 Randolph's R. 553; Inhabitants of Essex v. Berry, 2 Vermont R. 161. allows bills where defence was not known to party until after judgment. Hubbard v. Hobson, 1 Breese's (Illinois) R. 147; Foster v. Wood, 6 J. C. R. 87; but see Fish v. Lane, 2 Hayw. 342. If by mistake or the unskilfulness of the drawer, a bond be not drawn according to the understanding of the parties, the surety of the obligee shall be subjected in equity as far as he understood himself to be subject. Hason's administrators v. Pitman, Ib. 331. If, through mistake, a seal is not put to a bond, chancery will supply the defect. Montville v. Haughton, 7 Day's R. 543. Where the intention is manifest, chancery will always relieve against mistakes in all agreements. Wiser v. Bluchly, 1 J. C. R. 607. It must have clear and satisfactory proof of the mistake and of the real agreement between the parties. Lyman y. U. S. Ins. Co., 2 J. C. R. 630; S. C. on appeal, 17 J. R. 373; Executors of Getman v. Beardsley, 2 J. C. R. 274. Harrison v. Jameson, 3 lb. 232. When a seal or the signature of a person has, without competent authority, been affixed to a deed, equity may grant the party relief against the deed, on the ground either of fraud or quia timet. Cummins v. Kennedy, 4 Ib. 64. Where an aged man conveys his property to relatives on consideration of living with him and they abandon him, the deed will be set aside. Jenkins v. Jenkins, 3 Monroe, 329. Bond of drunken man set aside. King's Ex'rs v. Bryant's Ex'rs, 2 Hayw. 394. A judgment or decree obtained by fraud may be set aside in equity. Williams v. Fowler, 2 J. J. Marshall's R. 405. A forged deed will be ordered to be delivered up and cancelled. Leigh v. Everharts' Ex'rs, 4 lb. 380. Has general power to order a deed to be given up. Ex'rs of Ward v. Ward, 1 Hayw. R. 226. If it is too uncertain as to the estate granted, the court can set it aside. Pearse v. Owens, Ib. 234. The general principal of a court of equity is, that a bill in equity may be filed for the delivering up of an instrument which cannot be enforced at law, in order that the complainant may not be harassed by vexatious proceedings at law. Grover v. Hugell, 3 Russ. 434.]

As to mistakes under an ignorance of law, and the power of the court to relieve, Ignorantia legis neminem excusat is the general rule in equity as at law. It has exceptions but it seems not well settled. American cases adhere to it from danger of opening a door for so common a pretence. The courts do not relieve parties from acts and deeds fairly done on a full knowledge of facts though under mistake of law.

ject, the forms of proceeding in the courts of common law will not admit of such an investigation of the matter in those courts as will enable them to do justice. The parties claiming under the deed have therefore an advantage in proceeding in a court of common law which it is against conscience that they should use; and a court of equity will on this ground interfere to restrain proceedings at law until the matter has been properly

Many of the cases where exceptions to the rule have been admitted, are, mistake of facts as well as law or some suppression of the truth, fraud, or contrivance in the party. Garwood v. Administrators of Eldridge, 1 Green's C. R. 150, 145.

If this court can relieve against a mistake in law in any case where the defendant has been guilty of no fraud or unfair practice, which at least is very doubtful, it must be a case in which the defendant has in reality lost nothing whatever by the mistake and where the parties can be restored to the same situation, substantially, in which they were at the time the mistake happened. Crosier v. Acer, 7 Paige's R. 143, 137.

In Ohio, it was held on a bill of review to reverse a judgment of the supreme court of Fairfield county, that mistake of law will be corrected in equity, as where an instrument, by a clear mistake of parties—an error of opinion—as to the legal effect of the words used, fails to carry out their intention. Though such case is a mistake of law, complainant has a remedy in equity on the broad principle, that in this peculiar class of cases, such mistakes are relievable. A sheer mistake of law, where an instrument fails to carry out the intention of the parties by reason of a mistake in the effect of the terms employed by the draftsman, equity will relieve. Evants v. Strode's Administrator, 11 Ohio R. 487, 480.

In Massachusetts the power of a court of equity to reform or rectify contracts, however important and useful it may be in the administration of justice, is there held clearly not within the limited jurisdiction of their court. Hence where plaintiffs offered parol evidence explanatory of the true meaning of, and to show that the written agreement was erroneously drafted by mistake of the attorney who drew it, if its true construction be such as contended for by defendant, the evidence was deemed inadmissible and was rejected. Leach v. Leach, 18 Pick. R. (Mass.) 73, 68; and Dwight v. Pomeroy et al., 17 Mass. R. 303; Gould v. Gould, 5 Metcalf R. 276, 274, 528.

investigated, and if it finally appears that the deed has been improperly obtained, or that it is contrary to the intention of the parties in their contract, will in the first case compel the delivery and cancellation of the deed, or order it to be deposited with an officer of the court; and will compel a re-conveyance of property if any has been so conveyed that a re-conveyance may be necessary (t); and in the second case will either rectify the deed according to the intention of the parties, or will restrain the use of it in the points in which it has been framed contrary to, or in which it has gone beyond, their intention in their original contract (u). The instances of the exercise of the jurisdiction of courts of equity in these cases, and especially in the case of a deed fraudulently obtained, are numerous (x). On the ground of

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Bates v. Graves, 2 Ves. Jr. 287; Pringle v. Hodgson, 3 Ves. 617; Wright v. Proud, 13 Ves. 136; Ware v. Horwood, 14 Ves. 28; Huguenin v. Baseley, 14 Ves. 273; Willan v. Willan, 16 Ves. 72; Murray v. Palmer, 2 Sch. & Lefr. 474; Walker v. Symonds, 3 Swanst. 1; Gordon v. Gordon, 3 Swanst. 400; Wood v. Abrey, 3 Madd. 417; Tweddell v. Tweddell, 1 Turn. R. 1 (1).

(u) See 2 Atk. 33, 203; Henkle course would not be to order a per-

- (t) See on this subject, Bishop of v. Royal Exchange Assur. Comp. 1 Winchester v Fournier, 2 Ves. 445; Ves. 317; Rogers v. Earl, Dick. 294; Marquis of Townshend v. Stangroom, 6 Ves. 328; Clowes v. Higginson, 1 Ves. & Bea. 524; Beaumont v. Bramley, 1 Turn. R. 41; Ball v. Storie, 1 Sim. & Stu. 210; 2 Sim. & Stu. 178.
 - (x) It has been sometimes doubted whether the court ought to compel the delivery and cancellation of an instrument which ought not to be enforced, and whether the more proper

⁽¹⁾ And see the singular case of Norton v. Reilly, in the 1st vol. of the Collectanea Juridica, and the bold opinion of Chancellor Northington-an opinion which did honor to his head and heart. There, a bill was filed for relief against a deed obtained under circumstances of fanatical delusion. Also, Apthorpe v. Comstock, 1 Hopk. 143; 8 Cow. 386; 2 Paige, 482; Thompson v. Graham, 1 Paige, 384.]

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mistake the courts of equity have also frequently interfered in a variety of instances, and particularly in the cases of defective securities for money (y), and of marriage settlements founded on previous articles, where the settlement has been contrary to the evident intention of the parties in the articles (z).

The courts of equity will interfere upon the same grounds to relieve against instruments which destroy, as well as against instruments which create, rights; and therefore will prevent a release which has been fraudulently or improperly obtained from being made a defence in an action at law. And where a fine and non-claim were set up as a bar to an ejectment by an heir at law, who

petual injunction to restrain the use of the instrument. See 1 Ves. Jr. 284; Ryan v. Mackmath, 3 Bro. C. C. 15, and the cases there cited, and Mason v. Gardiner, 4 Bro. C. C. 436. But if the instrument ought not to be used, it is against conscience for the party holding it to retain it, as he can only retain it for some sinister purpose; and in the case of a negotiable instrument it may be used for a fraudulent purpose, to the injury of a third person. See Bromley v. Holland, Coop. R. 9; 11 Ves. 535; 17 Ves. 112; 1 Ves. & Bea. 244; Wynne v. Callandar, 1 Russ. R. 293; and see 2 Swanst. 157, note, where the leading authorities on this subject are collected. Of a forged instrument the court ought to take the custody; and in such a case the instrument has been generally ordered to be deposited with an officer of the court. Bishop of Winchester v. Fournier, 2 Ves. 445, and cases there cited (1).

(y) Sims v. Urry, 2 Ca. in Chan. 225; S. C. Rep. temp. Finch, 413, and 2 Freem. 16; Burgh v. Francis, 1 Eq. Ca. Ab. 320; Taylor v. Wheeler, 2 Vern. 564; Jennings v. Moore, 2 Vern. 609; Bothomly v. Lord Fairfax, 1 P. Wms. 334 (2).

(z) On this subject, see Randall v. Willis, 5 Ves. 262; Taggart v. Taggart, 1 Sch. & Lefr. 84; Blackburn v. Stables, 2 Ves. & Bea. 367; 1 Turn. R. 52.

^{. (1)} And see Apthorp v. Comstock, 2 Paige's C. R. 482.

⁽²⁾ Phænix Fire Ins. Co. v. Gurnee, 1 Paige's C. R. 278. Or, especially where the mistake arose from confiding in the representations of the adverse party. Rhode Island v. Massachusetts, 15 Peters 271, 233.

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had filed a bill in equity before the time had run on the fine, for discovery of title deeds, and for other purposes, with a view to try his title at law, the house of lords upon an appeal restrained the setting up the fine (a). In many cases of accident, as lapse of time, the courts of equity will also relieve against the consequences of the accident in a court of law. Upon this ground they proceed in the common case of a mortgage, where the title of the mortgagee has become absolute at law upon default of payment of the mortgage-money at the time stipulated for payment (d).

As the courts of equity will prevent the unfair use of an advantage in proceeding in a court of ordinary jurisdiction gained by fraud or accident, they will also, if the consequences of the advantage have been actually obtained, restore the injured party to his rights. Upon this ground there are many instances of bills to prevent the effect of a judgment at law, and to obtain relief in equity where it was impossible by any means to have the matter properly investigated in a court of law; or where the matter might be so investigated, to bring it again into a course of trial (c).(1).

Bills of the latter description or (as they are

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⁽a) Pincke v. Thornycroft, 1 Bro. C. C. 289.

⁽b) See 7 Ves. 273; 2 Sch. & Lefr. 685.

in Cha. 43; 3 C. Rep. 17; Robin- 12; 2 Ves. Jr. 135 (1). son v. Bell, 2 Vern. 146; Thomas v.

Gyles, 2 Vern. 232; Tilly v. Wharton, 2 Vern. 378; S. C. ib. 419; 1 Eq. Ca. Ab. 377, 378; Countess of Gainsborough v. Gifford, 2 P. Wms. (c) Curtess v. Smalridge, 1 Ca. 424; Hankey v. Vernan, 2 Cox's R.

^{(1) [}See the form of a bill, Willis, 118.]

^{(2) [}Saunders v. Jennings, J. J. Marshall's R. 513.]

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usually called) bills for a new trial, have not been of late years much countenanced (1). In general, it has beeen considered that the ground for a bill to obtain a new trial after judgment in an action at law must be such as would be ground for a bill of review of a decree in a court of equity upon discovery of new matter (d); and therefore where judgment has been obtained against one underwriter on a policy of insurance, a point of law being adjudged on a case reserved in favour of the plaintiff at law; and afterwards in other actions on the same policy, against other underwriters, judgment was given for the defendants on the same point, the first judgment being deemed to have been clearly erroneous; a demurrer was allowed to a bill brought by the defendant in the first action for a new trial (2). No new matter of fact had been discovered; and if this bill had been sustained, a similar bill might have been filed, whenever a court of law had pronounced an erroneous judgment which could not be reversed by a writ of error (e). So if the defendant in an action at law submits to go to trial without filing a bill in equity for a discovery of evidence, and after verdict against him attempts to obtain that discovery as a ground for a new trial, the court of equity will not countenance such a proceeding when there is

(d) 1 Ca. in Cha. 43.

(e) Gibson v. Bell, on demurrer, 30 July, 1800, in Chan.

(1) [See the form of a bill for a new trial, Willis, 167.]

^{(2) [}See the form of a demurrer, Willis, 436, page 186, post, and notes there.]

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no fraud in the conduct of the plaintiff at law (f) (1).

Cases of oppression, where a man has taken advantage of the situation of another to obtain from him an unreasonable contract, have been the subjects of relief on the same ground (g) (2); and in some cases the courts of equity have rescinded improper contracts on the grounds of general policy, and to prevent a public inconvenience, as in the case of securities given for marriage-brokage (h), or for the obtaining of public offices, or employments (i) (3).

If a bill for any of these purposes does not show a sufficient ground for a court of equity to interfere, the defendant may demur for want of matter of equity in the plaintiff's case to support the ju[133]

- (f-) Richards v. Symes, 2 Atk. 18 Ves. 12; 6 Madd. 109. 319; Williams v. Lee, 3 Atk. 223; Manning v. Mestaer, in Chan. 9 Dec. 1786, on cause shown against dissolving injunction. See Field v. Beaumont, 2 Swanst. 204.
- (g) Bosanquett v. Dashwood, Ca. t. Talb. 38; Osmond v. Fitzroy, 3 P. Wms. 131; Cooke v. Clayworth,

- (h) Smith v. Bruning, 2 Vern. 392; 3 P. Wms. 394; Williamson v. Gihon, 2 Sch. & Lefr. 357.
- (i) Law v. Law, 3 P. Wms. 391; Whittingham v. Bourgoyne, 3 Anstr. 900; Hannington v. Du Chatel, 1 Bro. C. C. 124; S. C. 2 Swanst. 159, note.

⁽¹⁾ A bill to set aside a verdict is not sustainable, where the facts on which the bill is founded, though discovered since the trial, might have been established at the trial, upon cross-e-amination. Taylor v. Sheppard, 1 Y. & C. Eq. Ex. Ca. 271.

^{(2) [}See the form of a bill in such a case, Willis, 171.]

^{(3) [}See the form of a demurrer to meet this sort of case, Willis, 437; and also the form of a bill. Ib. 180. And a reference is there given to 1 Chitty on Pl. 218, in connexion with the following remark: In pleadings at law, public statutes and the facts which they ascertain, must be noticed by the courts, without their being stated in pleading; and it is only necessary to state facts, which will appear to the court to be affected by the statute, concluding in general with an express reference to the statute, as by the words "contrary to the form of the statute."]

risdiction of the court. And the courts of equity will thus restrain and relieve against the effect of proceedings in other courts in such cases only as concern mere civil rights; and therefore if a bill is brought for relief against a proceeding at law upon a criminal prosecution, as an indictment, or information, or a mandatory writ, as a writ of prohibition, a mandamus, or any writ which is mandatory and not remedial, the defendant may demur (k) (1).

3. To enforce rights in conscience, though not legal rights (2).

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3. The principles of law which guide the decisions of the courts of ordinary jurisdiction, and especially the courts of common law, were principally formed in times when the necessities of men were few, and their ingenuity was little exercised to supply their wants. Hence it has happened that, according to the principles of natural and universal justice, there are many rights for injuries to which the law, as administered by those courts, has provided no remedy. This is particularly the case in matters of trust and confidence, of which the ordinary courts, taking in a variety of instances no cognizance, and the positive law being silent on the subject, the courts of equity, considering the conscience of the party entrusted as bound to perform the trust, have interfered to compel the performance (2). And it has long been settled, that where trustees are desirous of acting under the direction and protec-

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(2) See note, page 232.

⁽k) Lord Montague v. Dudman, 2 Ves. 396; 1 Eq. Ca. Ab. 131; and see 18 Ves. 220.

^{(1) [}See the form of a demurrer, Willis, 133.]

^{(3) [}See the form of a bill for relief in matters of trust, Willis, 186.]

tion of a court of equity, they may file a bill for those purposes against the persons interested in the trust property (l) (1). And in many other cases where the positive law has been silent, and there are rights in conscience for injuries to which the ordinary courts afford no remedy, the courts of equity have also interfered; enforcing the principles of universal justice upon the ground of obligation on the conscience of the party against whom they are enforced (m). To support a bill in any of these cases, it is necessary for the plaintiff to show that the subject of the suit is such upon which a court of equity will assume jurisdiction; and if he fails to do so, the defendant may demur.

4. Courts of equity in many cases will act as an- 4. To remove imcillary to the administration of justice in other courts, fair decision of a question. by removing impediments to the fair decision of a question. Thus, if an ejectment is brought to try a right to land in a court of common law, a court of equity will restrain the party in possession from setting up any title which may prevent the fair trial of the right (2); as a term for years, or other interest in a trustee, lessee, or mortgagee (n) (2).

^{249.} And see Fielden v. Fielden, 1 an heir responsible to creditors for Sim. & Stu. 255.

⁽m) It is said, 1 P. Wms. 777, that aliened.

⁽¹⁾ Leech v. Leech, 1 Ca. in Cha. and M. c. 14, courts of equity made the value of assets which he had

before the statute of the 3 & 4 W. (n) 6 Ves. 89; 1 Sch. & Lefr. 429;

^{(1) [}Mr. Willis, in giving the form of such a bill, refers to the case of Brown v. Yeall, referred to in a note to 7 Ves. 50, and observes, that the bill in this case appeared to have been signed by Lord Redesdale when at the bar, and, as it seems, to illustrate the theory of his lordship's treatise; and therefore he (Mr. Willis) had adopted it, p. 201.]

^{(2) [}See the form of such a bill, Willis, 210.]

⁽³⁾ If a bill to prevent the setting up of outstanding terms of years

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But this will not be done in every case; for as the court proceeds upon the principle that the party in possession ought not in conscience to use an accidental advantage to protect his possession against a real right in his adversary, if there is any circumstance which meets the reasoning upon this principle, the court will not interfere. Therefore, if the possessor is a purchaser for a valuable consideration without notice of the title of the claimant, this is a title in conscience equal to that of the claimant, and the court will not restrain the possessor from using any advantage he may be able to gain to defend his possession (o). It can hardly appear upon the face of a bill that the defendant is in such a situation, and therefore the benefit of this defence must generally be taken by plea; but if the case should be so stated, the defendant might demur; because the

and see 13 Ves. 298; Armitage v. (o) See 2 Ves. Jun. 457, 458; Wadsworth, 1 Madd. R. 189; Bar- Maundrell v. Maundrell, 7 Ves. 567; ney v. Luckett, 1 Sim. & Stu. 419; S. C. 10 Ves. 246. Northey v. Pearce, ib. 420.

Allegation that a defendant threatens to set up some out-standing terms. does not state that there are such terms, but merely alleges that the defendant threatens to set up some outstanding satisfied terms of years, or some other legal estate or interest in the premises, it is demurrable. For an outstanding legal estate may be such as to make it impossible for the plaintiff to recover in ejectment: as if the legal fee was not vested in the testator, where the plaintiff claims by devise. Stansbury v. Arkwright, 6 Sim. 481. But if the bill alleges that there are some outstanding terms, which, if set up by way of defence, would defeat the ejectment, and that the defendant threatens to set up those terms, such an allegation is sufficient. Baker v. Harwood, 7 Sim. 373.

outstanding terms.

In a bill to restrain the setting up of outstanding terms in ejectment Positive averment of title in a positive averment of an absolute and indefeasible title in the plaina bill to restrain a positive averiment of an absolute and indefeasible title in the plant-the setting up of tiff, as a devisee, is sufficient, notwithstanding the bill only alleges that the devisor "being or claiming to be seised or otherwise well entitled," devised the estate to the plaintiff. Houghton v. Reynolds, 2 Hare, 264.

case stated would appear to be such in which a court of equity ought not to assume jurisdiction. If the matter suggested in a bill as an impediment to the determination of a question in a court of ordinary jurisdiction in fact is not so, the defendant may also demur; for then there is no pretence for the interference of a court of equity.

5. Pending a litigation the property in dispute is property pending in danger of being lost or injured, and in such in litigation. often in danger of being lost or injured, and in such cases a court of equity will interpose to preserve it, if the powers of the court in which the litigation is depending are insufficient for the purpose (1). Thus during a suit in an ecclesiastical court for administration of the effects of a person dead, a court of equity will entertain a suit for the mere preservation of the property of the deceased till the litigation is determined, although the ecclesiastical court, by granting an administration pendentelite, will provide for the collection of the effects (p) (2). And, pending an ejectment in a court of common law, a court of equity will restrain the tenant in possession from committing waste, by felling timber, ploughing ancient meadow, or otherwise (q). Against this inconvenience a remedy at the common law was in many cases provided during the pendency of a real

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Richards v. Chave, 12 Ves. 462; Ed- Jac. R. 466; 6 Madd. 49, 105. munds v. Bird, 1 Ves. & Bea. 542; Atkinson v. Henshaw, 2 Ves. & B. 260, note; Lathropp v. Marsh, 5 85; Ball v. Oliver, 2 Ves. & B. 96; Ves. 259; and see Onslow v. ----, Rutherford v. Douglas, rep. 1 Sim. 16 Ves. 173. & Stu. 111, n.; 3 Meriv. 174;

⁽p) King v. King, 6 Ves. 172; Jones v. Frost, 3 Madd. 1; S. C. 1

⁽q) Pulteney v. Shelton, 5 Ves.

⁽¹⁾ See note, page 132.

^{(2) [}See the form of such a bill, Willis, 215.]

action by the writ of estrepement (r); and when the proceeding by ejectment became the usual mode of trying a title to land, as the writ of estrepement did not apply to the case, the courts of equity, proceeding on the same principles, supplied the defect.

But, in general, if the court in which the suit is depending can itself provide for the safety of the property, a demurrer will hold. The interference to preserve the effects of a person dead pending a litigation in the ecclesiastical court, touching the administration of those effects, scarcely forms an exception to this rule; for the protection afforded by an administration pendente lite has been often a very insufficient protection; and in the administration of personal effects the courts of equity have assumed a concurrent jurisdiction with the ecclesiastical courts, and for many purposes have a much more effectual jurisdiction, particularly for payment of creditors, and concluding all parties by the judgment of the court in the distribution of the effects, and preserving the surplus for the benefit of those who may finally appear to be entitled to it (1).

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6. To prevent the assertion of a doubtful right

6. Doubts have been suggested how far a court of equity ought to interfere to prevent injury arising ductive of irre-parable damage to property pending a suit founded on trespass. This doubt, it should seem, ought to be confined to cases of mere trespass, and where the injury done

(r) F. N. B. 60.

^{(1) [}See the form of a bill by simple contract creditors for payment: of debt and marshalling assets, Willis, 220.]

⁽²⁾ See note, page 132.

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is not probably irreparable (s) (1). But when a doubtful right has been asserted in a manner productive of irreparable injury, the courts have interfered. Therefore, where the tenants of a manor, as in cases of claiming a right of estovers, cut down a great fringement of quantity of growing timber of great value, their patents. title being doubtful, the court of chancery entertained a bill at the suit of the lord of the manor to restrain this assertion of it (t); and indeed the commission of waste of every kind, as the cutting of timber, pulling down of houses, ploughing of ancient pasture, working of mines, and the like, is a very frequent ground for the exercise of the jurisdiction of courts of equity, by restraining the waste till the rights of the parties are determined. The courts of equity have also extended their relief to restrain the owner of a mine from working minerals in the adjoining land of another, though a mere trespass under the cover of a right (u).

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The courts of equity seem to have proceeded upon a similar principle in the very common cases of persons claiming copy-right of printed books (2),

^{305; 10} Ves. 291; 17 Ves. 110, 281; in Chan. 1 Sch. & Lefr. 8. 1 Swanst. 208, 210. See above, 136, note (u).

⁽s) Hanson v. Gardiner, 7 Ves. and Stonor v. Whiting, Hil. 1768,

⁽u) Mitchell v. Dors, 6 Ves. 147; 7 Ves. 308; Thomas v. Oakley, 18

⁽t) Stonor v. Strange, Mich. 1767, Ves. 184.

^{(1) [}See the form of a bill for an account and injunction where a trespass has been committed, Willis, 228.]

⁽²⁾ Where a person seeks to restrain an infringement of his copy-to specify piraright, it is not necessary for him to specify, either in his bill or in his ted passages. affidavit, the parts of the defendant's work which have been taken from his work; but it is sufficient to allege generally, that parts of the defendant's work have been pirated from the plaintiff's work. For the pirated passages are pointed out by counsel when the injunction is moved for. Sweet v. Maugham, 11 Sim. 51.

and of patentees of alleged inventions (1), in restraining the publication of the book at the suit of the owner of the copy, and the use of the supposed invention at the suit of the patentees (2). But in both these cases the bill usually seeks an account; in one, of the books printed, and in the other, of the profit arisen from the use of the invention: and in all the cases alluded to it is frequently, if not constantly, made a part of the prayer of the bill that the right, if disputed, and capable of trial in a court of common law, may be there tried and determined under the direction of the court of equity; the final object of the bill being a perpetual injunction to restrain the infringement of the right claimed by the plaintiff (x).

In all cases of waste committed on lands or tene-162

(x) On the subject of copyright, 2 Ves. & Bea. 19; Gee v. Pritch-

see Hogg v. Kirby, 8 Ves. 215; ard, 2 Swanst. 402; Rundell v. Longman v. Winchester, 16 Ves. Murray, 1 Jac. R. 311; Lawrence v. 269; Wilkins v. Aikin, 17 Ves. 422; Smith, 1 Jac. R. 471; Barfield v. Southey v. Sherwood, 2 Meriv. 435; Nicholson, 2 Sim. & Stu. 1 (3); on Lord and Lady Percival v. Phipps, that of patents, see Harmer v. Plane,

Allegations in a bill to restrain infringement of a patent.

⁽¹⁾ In a bill to restrain the infringement of a patent, it is not necessary to set forth a full statement of the specification enrolled in respect of the letters patent. If the plaintiff by his bill refers to the specification, and alleges that he has done all that was required of him, the court on demurrer will give credit to the allegation. Westhead v. Keene, 8 Law J. (N. S.) Ch. Rep. 89.

^{(2) [}See the form of such a bill as to copyright, Willis, 233, and notes there. And as to a patent, Ib. 245.]

^{(3) [}Also, Mawman v. Tegg, 2 Russ. 385; Baily v. Taylor, 1 Russ. & M. 73. As to restoring a bill relating to copyright. Barfield v. Nicholson, 1 Sim. 494. The act of congress of May 31, 1790, ch. 42, (2 Bior. 104,) refers the party injured in a case of copyright to any court of record of the United States wherein the same is cognizable; but no jurisdiction is given to either the circuit or district courts. Binns v. Woodruff, Coxe's Digest, 197.]

ments, the courts of equity originally proceeded by analogy to the provisions of the old common law, by which tenant by the courtesy and in dower answered only for the value of the waste done, and a custos was assigned to prevent further waste. The statute of Marlebridge, 52 H. III. c. 23, added a fine for the offence to full damage for the injury done; and afterwards the statute of Gloucester, 6 Edw. I. c. 5, gave treble damages, and the forfeiture of the place wasted by tenant by the courtesy, for life, or for years. The forfeiture by waste, and all penalties, ought to be waived in a bill for restraining waste(y), the courts of equity declining to compel a discovery which may subject a defendant to any penalty or forfeiture, and confining the relief given to compensation for the damage done, and restraining future injury (2). So at law the person entitled to the benefit of forfeiture for waste might waive the action for waste, and maintain an action of trover for trees felled by a tenant impeachable for waste (z).

With respect to copyholds, the courts appear, in some instances, to have refused to restrain waste, and left the lord to his legal remedy by forfeiture (a).

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¹⁴ Ves. 130; Canham v. Jones, 2 Ves. & Bea. 248; Hill v. Thompson, 3 Meriv. 622 (1).

⁽y) 1 Atk. 451.

⁽z) Berry v. Heard, Cro. Car. 242. 673, this decision was overruled.

⁽a) Dench v. Bampton, 4 Ves. 700. In a cause, however, of Richards v. Noble, before Lord Erskine, when Chancellor, now reported in 3 Meriv.

^{(1) [}Sheriff v. Coates, 1 Russ. & M. 159; Burrall v. Jewett, 2 Paige's C. R. 134.]

⁽²⁾ See the forms of bills to restrain waste, Willis, 39, 254; and prayer for injunction to restrain, 1b. 9. And see notes at p. 254, of the same book.]

The rights of the lord and tenant of copyholds depending on the custom of each manor, it has perhaps been thought that the lord is not entitled to that protection which is given to rights ascertained by the common law of the land, and that he has generally the remedy in his own hands. Upon a lease of land in Ireland for lives, renewable for ever, the courts of equity there have declined restraining waste not specially provided for by the terms of the lease (b).

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But in the case of waste the courts of equity have in many instances given remedies where the common law has provided none. Thus in the case of coparceners (c) and tenants in common (d), the court has interfered to prevent the destruction of the property by one coparcener, or one tenant in common, to the injury of the rest (e). So where tenant for life not impeachable for waste has proceeded to destruction of a mansion-house (f), or to cut down ornamental trees, or trees necessary for the protection of a mansion, or young saplings (g). In these cases it should seem that the courts have proceeded on the ground that the acts done were an unconscientious use of the powers given to the particular tenant, and in some instances perhaps partaking of the nature of mere malicious mischief (h). It has

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⁽b) Calvert v. Gason, 2. Sch. & Lefr. 561.

⁽c) Beaumont and Sharp, May 9, 1751.

⁽d) Hole v. Thomas, 7 Ves. 589; Twort v. Twort, 16 Ves. 128.

⁽e) 7 Ves. 590; 16 Ves. 131.

⁽f) Vane v. Lord Barnard, 2 Vern. 738.

⁽g) Abraham v. Bubb, 2 Freem. 53; Chamberlyne v. Dummer, 1 Bro. C. C. 166, and cases there cited; and see above, p. 137, note (u).

⁽h) 2 Freem. 278; Bishop of London v. Web, 1 P. Wms. 527.

been much doubted whether in some instances this relief has not been carried to an extent which may be found productive of great inconvenience, and per-- haps injustice, if the decisions should be implicitly followed (i).

Where persons were bound by covenant to keep the banks of a river in repair, and by their acts in contravention of the covenant great injury was likely to arise, a court of equity has interfered by injunction (k).

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In all the cases in which the interference of a court of equity is thus sought, if the bill should not clearly show the title of the plaintiff, or his right to demand the assistance of the court in his favour, or that the case is one to which the court will apply the remedy sought, the defendant may demur.

7. It has been mentioned (1) that where two or 7. To compel more persons claim the same thing by different titles, interplead. and another person is in danger of injury from ignorance of the real title to the subject in dispute, courts of equity will assume a jurisdiction to protect him; and that the bill exhibited for this purpose is termed a bill of interpleader, the object of it being to compel the claimants to interplead, so that the court may adjudge to whom the property belongs, and the plaintiff may be indemnified (1).

⁽i) See 16 Ves. 185.

cited 2 Brown, C. C. 65.

⁽k) Lord Kilmorey v. Thackeray, (l) See above, p. 58.

⁽¹⁾ See note to p. 132, and p. 59, note.

[[]See the form of such a bill, Willis, 303, and notes there. Also, p. 49, 50, ante, and the notes.

In The Mohawk and Hudson Rail R. Co. v. Clute, 4 Paige, 385, where the substance of an interpleader bill is given, the bill prayed that the defendants may interplead and adjust their respective claims

The principles upon which the courts of equity proceed in these cases are similar to those by which the courts of law are guided in the case of bailment; the courts of law compelling interpleader between persons claiming property, for the indemnity of a third person in whose hands the property is, in certain cases only; as where the property has been bailed to the third person by both claimants, or by those under whom both make title; or where the property came to the hands of the third person by accident; and the courts of equity extending the remedy to all cases to which in conscience it ought

between themselves, and that the just or proper sums might be paid to such of the defendants as should appear to be entitled to the same. Also, a prayer for general relief and for a preliminary injunction. The bill was, it was held, defective in form as a simple bill of interpleader:

1. An offer to pay so much as is properly chargeable, or as the court may direct would be a very proper offer in a bill for relief in the nature of a bill of interpleader; but as the complainant in a simple bill of interpleader which is filed for the simple purpose of asking the defendants to litigate and settle their conflicting claims between themselves, cannot litigate any part of the claim of either defendant, the complainant should, it seems, pay into court the largest sum claimed, (where, for instance, two several taxes in different places are assessed on the same property and it is doubtful to which it belongs) or pay to the one party the balance over what was claimed by the other; or, at least, offer to bring into court the greater or less amount assessed.

2. Complainant must show that he is ignorant of the rights of defendants, or that there is some doubt at least, to which of such defendants the debt or duty belongs. So that he cannot safely pay or render it to one without some risk of being made liable for the same to the other. For the only ground upon which the court assumes jurisdiction in a simple bill of interpleader, is the danger of injury to the complainant from the doubtful rights and conflicting claims of the several defendants as between themselves. For this reason he must state his own situation in reference to the fund in question or the duty to be performed and the nature of the claims of the several defendants to the same. Idem 391—2—3.

to extend, whether any suit has been commenced by any claimant, or only a claim made (m).

This remedy has been applied to the case of tenants of lands charged with annuities, and liable to distress by their landlord, and the claimants of annuities (n), and to other cases of disputed titles (o), in which the tenants have been permitted to pay their rents into court (p).

If a bill of interpleader does not show that each of the defendants whom it seeks to compel to interplead claims a right, both the defendants may demur; one, because the bill shows no claim of right in him; the other, because the bill, showing no claim of right in the co-defendant, shows no cause of interpleader (q) (2). Or if the plaintiff shows no

(m) It may here be noticed, that if at the hearing the question between the defendants be ripe for decision, this court will make a decree; and that if such be not the case, it will direct an action, an issue or a reference to a master, in order to bring the matter to a determination. See Duke of Bolton v. Williams, 2 Ves. Jr. 138; S. C. 4 Bro. C. C. 297; Angell v. Hadden, 16 Ves. 202.

(n) Surry and others, tenants of Lord Waltham, against Vaux and others, 28 Feb. 1785; Aldridge v. Thompson, 2 Bro. C. C. 150; Lord Thomond's Case, cited 9 Ves. 107;

Angell v. Hadden, 15 Ves. 244; S. C. 16 Ves. 202.

- (o) Wood v. Kay and Wife and others, 19 Dec. 1786; 2 Ves. Jr. 312; 16 Ves. 203, 204.
- (p) It is however observable, that in such cases the court interferes on the ground of privity having been created by the act of the landlord between his tenant and the other claimant. See Cowtan v. Williams, 9 Ves. 107; Clarke v. Byne, 12 Ves. 383; E. I. Comp. v. Edwards, 18 Ves. 376.
 - (q) 1 Ves. 249 (1).

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⁽¹⁾ See the forms of such demurrers, Willis 440, 441. the case of Bedell v. Hoffman, 2 Paige's C. R. 199.]

⁽²⁾ The one may demur upon the ground that complainant has a perfect defence at law, against his claim; and the other that the complainant has neither a legal or an equitable defence to his claim, and has therefore no right to call on him to interplead with a third person

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right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur (r). A bill of this nature is also liable to a

himself has no privity, but who claims

(r) As, for example, if a tenant 304; 2 Anstr. 532; Johnson v. Atkinwere to file such a bill against his son, 3 Anstr. 798; or, an agent against landlord, and a person with whom he his principal and a third person. Nicholson v. Knowles, 5 Madd. by a title adverse to that of the land- 47 (1); a debtor against his creditor lord. Dungey v. Angove, 2 Ves. Jr. become a bankrupt, and the as-

who has no right. Where it appeared on the bill it was not a proper case for interpleader, and the defendants, instead of demurring, put in answers, and went to a hearing on pleadings and proofs, inserting in their answers, however, that the bill was improperly filed, the chancellor, on dismissing the bill said, it should be dismissed without prejudice to the rights of complainants on any future litigation with either defendant; so as not to preclude him upon the merits of their respective claims, which could not be legally adjudicated in this form of proceeding; and allowed the defendants costs on'y, which they would have had if they demurred, and the bill had been dismissed thereon. Shaw v. Coster, 8 Paige's R. 339, et seq.

[And see Randolph's administratrix v. Kinney, 3 Randolph's R. 394. A bill of interpleader may be filed, though the party has not been sued at law, or has been sued by one only of the conflicting claimants, or though the claim of one of the defendants is actionable at law and that of the other in equity. Richards v. Salter, 6 J. C. R. 445. And see also, Langston v. Boyleston, 2 Ves. Jr. 107; Angell v. Hadden, supra; Morgan v. Monsack, 2 Meriv. 107; Stephenson v. Anderson, 2 V. & B. 407.]

Where a bill of interpleader is filed by the officer of a company on behalf of a company, the affidavit annexed ought to state, not that the secretary, who is the mere nominal plaintiff, does not collude, but that to the best of his knowledge and belief, the society, who are the real plaintiffs, do not collude with the defendants. Bignold v. Autland, 11 Sim. 23.

(1) But see the case of Pearson v. Cardon, 4 Simon's R. 220. The facts of which case were these: B. & Co. deposited goods with the complainants (warehousemen) to await their directions; and they afterwards directed that the goods should be transferred to and held for T., which was done accordingly. The goods were subsequently claimed by C. as having been deposited by him with B. & Co., as his agents for the purpose of sale: Held, that although the complainants

peculiar cause of demurrer; for as the court will not permit such a bill to be brought in collusion with either claimant, the plaintiff, as has been already mentioned, is required to annex to his bill an affidavit that it is not exhibited in collusion with any of the parties, to induce the court to entertain jurisdiction of the suit; and the want of that affidavit is therefore a ground of demurrer (s) (1). A bill of this nature generally prays an injunction to restrain the proceedings of the claimants in some other court; and as this may be used to delay the payment of money by the plaintiff, if any is due from him, he ought by this bill to offer to pay the money due into court (t) (2). If he does not do so, it is perhaps in strictness a ground of demurrer (3).

signees of the latter, Harlow v. (s) Metcalf v. Harvey, 1 Ves. Crowley, 1 Buck, B. C. 273, and 248; and see 2 Ves. & Bea. 410. Lowndes v. Cornford, 18 Ves. 299; (t) Lord Thanat v. Patterson, 3 S. C. 1 Rose, B. C. 180. Barnard, 247; 2 Ves. Jun. 108, 109.

were the agents of B. & Co., yet that C. claimed under a paramount title; and, therefore, that it was a case of interpleader.]

(1) [Tobin v. Wilson, 3 J. J. Marshall's R. 67; Manks v. Holroyd, 1 Cowen's R. 691. In Connecticut, there is no occasion for this affi- collusion. davit. Nash v. Smith, 6 Day's R. 421. Nor is the non-offer of bringing the money into court any ground for demurrer. Ib. See the form of a demurrer for want of such an affidavit, Willis, 442; Eq. Draft. 77, (2d edit.) The form of the affidavit in Harrison's Pract. is said to go too far. Stevenson v. Anderson, 2 Ves. & B. 410. In Prax. Alm. Cur. Can. part 2, p. 80, there is the form of one which does not seem liable to the same objection. It runs thus: "The " plaintiff A. B. maketh oath and saith, that this bill is exhibited by "him voluntarily, and on his own account, and at his own costs; and "not at the desire or by the persuasion, or at the costs of any of the " parties defendants thereto."]

(2) Where a bill of interple eler is filed respecting a sum of money on which interest is payable at law, under the stat. 3 & 4 W. IV. c. interest. 42, s. 8, (as in the case of a sum insured,) the plaintiff ought to offer by his bill to pay the interest. Bignold v. Audland, 11 Sim. 23.

(3) A bill of interpleader is not demurrable on account of its not

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8. In many cases the courts of ordinary jurisdic-

8. To put a bound to litiga-

actions of ejectment.

tion admit, at least for a certain time, of repeated attempts to litigate the same question. To put an end to the oppression occasioned by the abuse of this privilege, the courts of equity have assumed a jurisas in the case of diction (u) (1). Thus, actions of ejectment having become the usual mode of trying titles at the common law, and judgments in those actions not being in any degree conclusive, the courts of equity have interfered; and, after repeated trials, and satisfactory determinations of questions, have granted perpetual injunctions to restrain further litigation (x), and thus have in some degree put that restraint upon litigation which is the policy of the common law in the case of real actions (y) (2).

Nuisances.

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Upon the same principle (z) the courts of equity seem to have interfered in cases as well of private as of public nuisance (3); in the first, at the suit of the party injured (a); in the second at the suit of the attorney-general (b) (4): restraining the exer-

in which a demurrer would be prevented by the money being brought into court. See 19 Ves. 323.

- (u) 2 Sch. & Lefr. 211.
- (x) Earl of Bath v. Sherwin, Prec. in Chan. 261; S. C. 4 Brown, P. C. 373, Toml. Ed. Leighton v. Leighton, 1 P. Wms. 671; S. C. 4 Bro. P. C. 378, Toml. Ed. And see Anon. Gilb. Eq. R. 183; S. C.
- It seems that there might be a case 2 Eq. Abr. 172; Barefoot v. Fry, Bunb. 158; 2 Sch. & Lefr. 211.
 - (y) Strange, 404.
 - (z) See Dick. 164; 16 Ves. 342; 19 Ves. 622.
 - (a) See Ryder v. Bentham, 1 Ves. 543; Att. Gen. v. Nicholl, 16 Ves. 338; S. C. 3 Mer. 687.
 - (b) See Anon. 3 Atk. 750; S. C. named Baines v. Baker, Ambl. 158; Att. Gen. v. Cleaver, 18 Ves. 211.

Offer to pay money into

- offering to pay the money claimed into court. But it is said that the plaintiff must bring it in before he takes any step in the cause. Meux v. Bell, 6 Sim. 175. But see supra, pp. 164, note, 166, note.
 - (1) See note to p. 132.
- (2) [The Revised Statutes of New-York have fixed the number of new trials at two, in cases of ejectment. 2 R. S. 309.]
 - (3) See note to p. 132, supra.
 - (4) But the jurisdiction of the court in behalf of private persons

cise of the nuisance where the proceedings at law are ineffectual for the purpose, and preventing the creation of a nuisance where irreparable injury to individuals, or great public injury would ensue (c) (1). In the case of a private nuisance it seems necessary that a judgment at law, ascertaining the rights of the parties, should have been previously obtained (d) (2). On informations by the attorney-general on behalf of the crown the court of exchequer has proceeded to the abatement of

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has been sustained in those cases where there is imminent danger of irreparable mischief before the tardiness of law could reach it. The court pursuing the analogy of the law, that a party may maintain a private action for special damage, even in case of a public nuisance, will now take such jurisdiction at the instance of a private person, where he is in imminent danger of suffering a special injury for which, under the circumstances of the case, the law would not afford an adequate remedy. The principle is, that in case of a public nuisance, where a bill is filed by a private person, asking for relief by means of prevention, the plaintiff cannot maintain a stand in a court of equity, unless he avers and proves some special injury. City of Georgetown v. The Alexandria Canal Co., &c., 12 Peters 98, 91.

To sustain a general demurrer to the bill, in Massachusetts, it must appear that no substantial and essential part of the complaint is within the provisions of the statute conferring equity. The statute authorizes the court to hear and determine in equity any matter touching waste or nuisance in which there is not a plain adequate and complete remedy at law. See Boston Water Power Co. v. Boston and Worcester Rail Road Corporation, 16 Pick. R. 521, 512.

- (1) [Van Bergen v. Van Bergen, 2 J. C. R. 272; Gardiner v. Trustees of Newburgh, Ib. 162; Hart v. Mayor, &c., of Albany, 3 Paige's C. R. 213. There must be a case of strong and imperious necessity, or the right must have been previously established at law, before the court will lend its aid in restraining the exercise of a nuisance. Corning v. Lowerie, 6 Ib. 439.]
- (2) See the form of a demurrer, in such a case, Willis 443, and note (h) there.

 ⁽c) 16 Ves. 342.
 (d) 19 Ves. 622; Chalk v. Wyatt, 2 Swanst. 333.

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nuisances injurious to the royal prerogative, such as nuisances in harbors, or even trespasses on the public rights of the crown without any nuisance (e). If a trespass is made on the soil of the crown, whether reserved for the private use of the sovereign, or for public purposes, and the trespass does not produce a public injury, the jurisdiction may be founded on the right of the crown to have the land arrented, and the profit accounted for as part of the royal revenue, in the nature of an assart; and if the trespass produces, or may in its consequences produce, public injury, the crown is entitled to the most effectual means of preventing the injury (f).

claimed against

Courts of equity will also prevent multiplicity of suits; and the cases in which it is attempted, and the General rights means used for that purpose, are various (1). several persons. this view, where one general legal right is claimed against several distinct persons, a bill may be brought to establish the right (g) (2). Thus where a right of fishery was claimed by a corporation throughout the course of a considerable river, and was opposed by the lords of manors and owners of land adjoining, a bill was entertained to establish the right

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(g) 2 Atk. 484; 11 Ves. 444;

Corporation of Carlisle v. Wilson,

⁽e) Att. Gen. v. Forbes, Ex. Trin. 1795; Hale de Jure Maris, p. 1, c. 4. p. 13; Churchman v. Tunstal, Hardr. 162; Att. Gen. v. Richards, Anstr. 603.

¹³ Ves. 276; Duke of Norfolk v. Myers, 4 Madd. 83; 1 Jac. & W. 369.

⁽f) 18 Ves. 218.

It has been said, in Maryland, that chancery will restrain a public nuisance, pending any judicial proceedings before those tribunals by which the authority to do the act or its lawfulness is to be determined. Williamson v. Carnan, 1 Gill & Johns. 184.1

⁽¹⁾ See note to p. 132, supra,

^{(2) [}See the form of such a bill, Willis, 277.]

against the several opponents, and a demurrer was overruled (h).

As the object of such bills is to prevent multiplicity of suits by determining the rights of the parties upon issues directed by the court, if necessary for its information, instead of suffering the parties to be harassed by a number of separate suits, in which each suit would only determine the particular right in question between the plaintiff and the defendant in it, such a bill can scarcely be sustained where a right is disputed between two persons only, until the right has been tried and decided upon at law (i). Indeed in most cases it is held that the plaintiff ought to establish his right by a determination of a court of law in his favor before he files his bill in equity (k); and if he has not so done, and the right he claims has not the sanction of long possession (l), and he has any means of trying the matter at law (m), a demurrer will hold (1). If he has not been actually interrupted or dispossessed, so that he has had no opportunity of trying his right, he may bring a bill to establish it, though he has not previously recovered in affirmance of it at law, and in such a case a demurrer has been overruled (n).

It is not necessary to establish a right at law be-

(h) Mayor of York v. Pilkington, 1 Atk. 282.

(i) Lord Teynham v. Herbert, 2 Atk. 483.

414; 2 Sch. & Lefr. 208; 11 Ves. 531. But see Welby v. Duke of 444; 1 Jac. & W. 369.

(1) Bush v. Western, Proc. in 2 Sch. & Lefr. 209. Chan. 530.

(m) Whitchurch v. Hyde, 2 Atk. 391; Wells v. Smeaton, in Chan. 27 May, 1784.

(n) 1 Atk. 284. And see Duke (k) 1 Atk. 284; Anon. 2 Ves. of Dorset v. Girdler, Prec. in Chan. Rutland, 2 Bro. P. C. 39, Toml. Ed.; 170

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^{(1) [}See the form of a demurrer, relating to a nuisance, which will answer in this case, Willis, 443.]

fore filing a bill where the right appears on record, as under letters patent for a new invention, in which case a demurrer to a bill for an injunction to restrain

an infringement of the patent right has been overruled (o). So in the cases of bills brought by authors, or their assignees, to restrain the sale of books where 171 the right which is the foundation of the bill is grounded on an act of parliament (p). And where a right appeared on record by a former decree of the court, it was determined that it was not necessary to establish it at law before filing a bill (q). Where a right prima facie and of common right is

> vested in the crown, it will receive the same protection (r), and this principle may be applied to some of the cases mentioned in a preceding page.

> A court of equity will thus protect private rights,

or rights of those who may be comprehended under one common capacity, as the inhabitants of a parish, or the tenants of a manor, which has been frequently done in bills to establish parochial customs of tithing disputed by the tithe-owner, and more rarely in bills to establish the customs of manors disputed by the lord (s); but will not establish or decree a perpetual injunction for the enjoyment of a right in contradiction to a public right, as a right to a highway, or a common navigable river, for that would

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⁽o) Horton and Maltby, in Chan. 23 July, 1783; 3 Meriv. 624. (1).

⁽p) 1 Ves. 476.

⁽q) Ibid.

⁽r) See 6 Ves. 713; Grierson v.

Eyre, 9 Ves. 341; 13 Ves. 508.

⁽s) New Elme Hospital v. Andover, 1 Vern. 266; Baker v. Rogers, Sel. Ca. in Cha. 74; Cowper v. Clerk, 3 P. Wms. 155; 2 Eq. Ca. Ab. 172.

^{(1) [}And See Mawman v. Tegg, 2 Russ. 285.]

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be to enjoin all the people of England (t), although it will restrain a public nuisance at the suit of the attorney-general.

A court of equity will also prevent injury in some Bill quia timet. cases by interposing before any actual injury has been suffered; by a bill which has been sometimes called a bill quia timet (1), in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading (u). Thus a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances (x) (2).

. 9. To administer to the ends of justice without 9. To compel 8 pronouncing any judgment which may affect any of other courts.

(t) Lord Hardwicke, in Lord Fauconberg and Pierse, 11th of 1 Vern. 189, 190, and on the general May, 1753; 2 Eq. Ca. Ab. 171; subject, see also 1 Ves. 283; Flight Ambl. 210.

(u) Co. Litt. 100, a.

(x) Lord Ranelagh v. Hayes, v. Cook, 2 Ves. 619; Green v. Pigot, 1 Bro. C. C. 103; Brown v. Dudbridge, 2 Bro. C. C. 321.

(1) See note to p. 132.

[A bill quia timet will not lie, unless the complainant may be subjected to loss by the neglect, inadvertence or culpability of another. Randolph's administrator v. Kinney, 3 Randolph's R. 394.

The preventive relief which which this species of bill affords being requisite in those cases only where the property is of a perishable nature, it cannot, of course, be necessary in respect of the inheritance of real estate. Jeremy's Eq. Jur. 350.

A plea of a former recovery to a bill quia timet must show that the same subject matter and the right to the same land was before decided upon. 'Cates v. Loftus' heirs, 4 Monroe's R. 441.]

2) [See the form of a bill in such a case, Willis, 298.]

rights, the courts of equity in many cases compel a discovery which may enable other courts to decide on the subject. The cases in which this jurisdiction is exercised will be considered in treating of demurrers to discovery only.

10. To preserve testimony.

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10 When the testimony of witnesses is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation, a court of equity will lend its aid to preserve and perpetuate the testimony (y)(1); and as the courts of common law cannot generally examine witnesses except viva voce upon the trial of an action, the courts of equity will supply this defect by taking and preserving the testimony of witnesses going abroad, or resident out of the kingdom (z), which may be afterwards used in a court of common law. As the object of this jurisdiction is to assist other courts, and by preserving evidence to prevent future litigation, there are few cases in which the court will decline to exercise it. A demurrer to a bill seeking the benefit of it will therefore seldom lie (a) (1); and in a case where the court was of opinion that the defendant might demur both to the discovery sought and the relief

⁽y) See above, 62, note (y).

⁽z) As to the examination of witnesses resident abroad, see Cock v. Donovan, 3 Ves. & Bea. 76; Bowden v. Hodge, 2 Swanst. 258: Cheminant v. De La Cour, 1 Madd. 208; Devis v. Turnbull; 6 Madd. 232; Baskett v. Toosey, 5 Madd. 261; Angell v. Angell, 1 Sim. & Stu. 83; Men- Chichester, 2 Jac. & W. 439.

dizabel v. Machado, 2 Sim. & Stu.

⁽a) 1 Atk. 451; 571; 1 P. Wms. 117; Tirrell v. Co., 1 Rol. Ab. 383; Mendez v. Barnard, 16 May, 1735, on demurrer; Lord Dursley v. Fitzhardinge, 6 Ves. jun. 251 to 266. See however, The Earl of Belfast v.

^{(1) [}A bill to perpetuate testimony, to lands of which the complainants were out of possession, has been dismissed on demurrer. Smith-Ballard, 2 Hayward's (North Carolina) R. 289.]

prayed by a bill, it was held that to so much of the bill as sought to perpetuate the testimony of witnesses the defendant could not demur (b). But if the case made by the bill appears to be such on which the jurisdiction of the court does not arise, as if the matter to which the required testimony is alleged to relate can be immediately investigated in a court of law, and the witnesses are resident in England, a demurrer will hold (c) (1). Still, however, where from circumstances, as the age or infirmity of witnesses, or their intention of leaving the kingdom, it has been probable that the plaintiff would lose the benefit of their testimony, though he should proceed with due diligence at law, the courts has sustained a bill for their examination (d): and to avoid a demurrer in this case it seems necessary to annex to the bill an affidavit of the circumstance by means of which the testimony may probably be lost (e). A bill for the examination of a single witness has been permitted where his evidence was of the utmost importance, and he was the only witness to the point, apparently upon the

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¹ Atk. 450. See Thorpe v. Macau- Aylesbury, 15 Ves. 176; Andrews v. lay, 5 Madd. 218; Shakell v. Ma- Palmer, 1 Ves. & B. 21; Corbett v.

Dick. 14; 1 Sim. & Stu. 89.

⁽d) As to the examination of witnesses under such circumstances, de 117; 1 Ves. & B. 23 (2). bene esse, see Shirley v. Earl Fer-

⁽b) Earl of Suffolk v. Green, rers, 3 P. Wms. 77; Palmer v. Lord caulay, 2 Sim. & Stu. 79. Corbett, 1 Ves. & B. 335; Atkins v. (c) Lord North v. Lord Gray, Palmer, 5 Madd. 19; Dew v. Clarke, 1 Sim. & Stu. 108.

⁽e) Phillips v. Carew, 1 P. Wms.

^{(1) [}See the form of such a demurrer, Willis, 445. Also the form of a bill to perpetuate testimony, Ib. 311. And the affidavit, Harrison's Pract. (Newl. ed.) 407. Look also at page 51, ante.]

⁽²⁾ Laight v. Morgan, 2 C. C. E. 344; S. C. 1 J. C. 429.

single ground, that as he was the only witness there was danger of losing all evidence of the matter before it could be given in a court of law: but in this case an affidavit of the witness was annexed to the bill (f). The principle on which it is required in these cases to annex to the bill an affidavit of the circumstances which render the examination of witnesses proper in a court of equity, though the matter is capable of being made immediately the subject of a suit at law, seems to be the same as that on which the practice of annexing an affidavit of the loss or want of an instrument to a bill seeking to obtain in a court of equity the mere legal effect of the instrument is founded, namely, that the bill tends to alter the ordinary course of the administration of justice, which ought not to be permitted upon the bare allegation of a plaintiff in his bill (1).

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II. That som e

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II. It has been before noticed, that the establishment of courts of equity has obtained throughout other court of ment of courts of equity has the proper jurisdict the whole system of our judicial polity; and that most of the inferior branches of that system have their peculiar courts of equity, the court of chancery assuming a general jurisdiction in cases not within the bounds, or beyond the powers of inferior jurisdic-The principal of the inferior jurisdictions in England are those of the counties palatine of Chester, Lancaster, and Durham, the courts of great session in Wales, the courts of the two universities of Oxford

> (f) Shirley v Earl Ferrers, 4th N.; 3 P. Wms. 77; M. 1730, 8 Ves. Seal after Trin. Term, 1730. MS. 32. See above, p. 63, note (z).

⁽¹⁾ Laight v. Morgan, 2 C. C. E. 344.

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and Cambridge, the courts of the city of London and of the cinque-ports (g) (1). These are necessarily bounded by the locality either of the subject of the suit or of the residence of the parties litigant. Where those circumstances occur which give them jurisdiction they have exclusive jurisdiction in matters of equity as well as matters of law; and they have their own peculiar courts of appeal, the court of chancery assuming no jurisdiction of that nature, though it will in some cases remove a suit before the decision into the chancery by writ of certiorari. When therefore it appears on the face of a bill that another court of equity has the proper jurisdiction, either immediately, or by way of appeal, the defendant may demur to the jurisdiction of the court of chancery. Thus to a bill of appeal and review of a decree in the court of the county palatine of Lancaster the defendant demurred, because on the face of the bill it was apparent that the court of chancery had no jurisdiction; and the demurrer was allowed (h). But demurrers of this kind are very rare; for the want of jurisdiction can hardly appear upon the face of the bill, at least so conclusively as is necessary (i) to deprive the chancery, a court of general jurisdiction, of cognizance of the suit; and a demurrer for want of jurisdiction founded on locality of the subject of the suit, which alone can exclude the jurisdiction of the chancery in a matter cog-

(h) Jennet v. Bishopp, 1 Vern.

⁽g) The court of exchequer, as a court of equity, does not seem to give to any person the privilege of being

sued there.

⁽i) See 1 Ves. 203, 204.

⁽¹⁾ See notes, p. 6.

nizable in a court of equity, has even been treated

as informal and improper (k). This, however, can only be considered as referring to cases where circumstances may give the chancery jurisdiction, and not to cases where no circumstance can have that effect. Thus the counties palatine having their peculiar and exclusive courts of equity under certain circumstances, which will be more fully considered in another place (l), the court of chancery will not interfere when all those circumstances attend the case, and they are shown to the court; though if those circumstances are not shown, or if they are not shown in proper time, and the defendant, instead of resting upon them and declining the jurisdiction, enters into the defence at large, the court, having general jurisdiction, will exercise it. But where no circumstance can give the chancery jurisdiction, as in the case alluded to of a bill of appeal and review of a decree in a county palatine, it will not entertain the suit, even though the defend-

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III. Disability of the plaintiff.

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III. If a plaintiff is not entitled to sue by reason of any personal disability (m), which is apparent in the bill, the defendant may demur. Therefore, if an infant, or a married woman, an idiot or a lunatic, exhibiting a bill, appear upon the face of it to be thus incapable of instituting a suit alone, and no next friend or committee is named in the bill, the defendant may demur (1); but if the incapacity does

ant does not object to its deciding on the subject.

⁽k) See Roberdeau v. Rous, 1 the court of chancery.

Atk. 543.

(m) See Wartnaby v. Wartnaby,

⁽l) See pleas to the jurisdiction of 1 Jac. R. 377.

^{(1) [}See the form of a demurrer, Willis, 449.]

not appear upon the face of the bill, the defendant must take advantage of it by plea. This objection extends to the whole bill, and advantage may be taken of it as well in the case of a bill for discovery merely as in the case of a bill for relief. For the defendant in a bill for a discovery merely, being always entitled to costs after a full answer as a matter of course, would be materially injured by being compelled to answer a bill exhibited by persons whose property is not in their own disposal, and who are therefore incapable of paying the costs.

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IV. Interest in the subject of the suit (1), or a right IV. Want of in-

to sue.

(1) If one or some of the co-plaintiffs be not interested in the sub- Co-plaintiffs not ject of the suit, the bill is demurrable: (Page v. Townsend, 5 Sim. 395; interested; such as an agent; Delondre v. Shaw, 2 Sim. 237,) as in the case of a mere agent concerned with the subject matter of the suit, (The King of Spain v. Machado, 4 Russ. 225;) or a trustee under a deed which never had any or a trustee un-operation as a valid instrument. Cuff v. Platel, 4 Russ. 242.

So where an indorsee of a bill of exchange brings an action against or a person for the acceptor (a banker) who accepted the bill as agent for another (a customer,) and refuses to pay on the ground that the indorsee is not of exchange, the person authorized to receive the money by the party to whose order it was made payable, and the acceptor files a bill of discovery in aid of his defence; such a bill is demurrable, if the party for whom he the defence to accepted the bill is joined with him as a co-plaintiff: because there is the acceptor. no contract between the indorsee and the party for whom the acceptor has accepted the bill: the indorsee has nothing whatever to do with that party, although he, and not the acceptor, is the person substantially interested in the result of the action.

And if, in such a suit, the party to whose order the money was payable, is an officer of the government of a foreign country, and the money forms part of a loan negotiated by the government of that country, and the government is changed, no question can be raised respecting the right of a new government, or any one claiming through it, to receive the money negotiated by the former government: for, in such a suit, the question, who is beneficially entitled to the money, cannot be discussed: Glyn v. Soares, 3 M. & K. 450. In this case the treasurer of the royal treasury of Portugal was the officer to whose order

whom another accepted a bill co-plaintiff with such acceptor, in a bill of dis

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in the thing demanded, and proper title to institute a suit concerning it (1), are essentially necessary to

the money was payable, as part of a loan negotiated by Don Miguel, who was shortly afterwards succeeded by Donna Maria.

Reasons against joining as co-plaintiffs perinterest.

Great evil might be occasioned if persons having no interest were allowed to be made co-plaintiffs with others having an interest in sons having no the subject of the suit. For instance, by an artful selection of coplaintiffs having no interest, a co-plaintiff having an interest might thereby insure such a series of abatements, by a succession of deaths and marriages, as would enable him to oppress the defendants, and prevent the suit from ever reaching a stage in which the expense might be made to recoil upon himself. And if a defendant had occasion to file a cross-bill, he would be obliged to make the other co-plaintiffs defendants thereto. Again, a plaintiff out of the jurisdiction of the court might escape from giving security for costs, by joining, as a coplaintiff, a person having no interest, but residing within the jurisdiction. And all the plaintiffs who have an interest in the suit might die and leave those who have no interest to carry on the suit. Arg. of counsel in The King of Spain v. Machado, 4 Russ. 225.

Exception in the case of infant plaintiffs and others.

Where a bill is filed against a trustee for a breach of trust, but two of the co-plaintiffs induced the trustee to commit such breach of trust, and gave him an indemnity in respect thereof, still, if the other coplaintiffs are infants, and the objection is not taken until the hearing, it will be overruled. Wilkinson v. Parry, 4 Russ. 272.

Bill by an uncertificated bankassignees.

(1) An uncertificated bankrupt cannot call on his assignees for a general account of all their transactions, which he might have by applying to the court of bankruptcy. Tarleton v. Hornby, 1 Y. & C. Eq. Ex. 172.

Bill by a bankrupt against his

But if the assignees of a bankrupt fraudulently and collusively sell his estate while he is proceeding to get his commission superseded, he assignees and a his estate withe he is processing assignees and a his estate wither he is processing assignees and a his estate wither he is processing assignees and a his estate wither he is processing assignees and a his estate wither he is processing assignees and a his estate wither he is processing assignees and a his estate wither he is processing as a signer of the purchaser, to set aside the sale, on the ground of fraud and collusion, if the purchaser has not come in under the commission, so that the court of review has no jurisdiction over him, and if the bankrupt has settled with all his creditors, and they have consented to the commission being superseded. Lautour v. Holcombe, 8 Sim. 76.

Bill by an insolvent.

And a bill by an insolvent to set aside an assignment by his assignee of his interest under a will, on the ground of a special case of collusion between his assignees and the executors, is not demurrable. Burton v. Jayne, 7 Sim. 24. The counsel for the insolvent, in this case, urged that the collusion, and the fact that the Insolvent Debtors' Court had no power to set aside deeds, were sufficient to maintain the bill.

sustain a bill; and if they are not fully shown by the bill itself the defendant may demur(m)(1). Therefore, where a protestant next of kin claimed a rentcharge settled on a papist on her marriage, a demurrer was allowed (n), for the plaintiff had evidently no right to the thing which he demanded by his bill, the papist being incapable of taking by purchase (2), and the grant of the rent-charge being therefore utterly void. And where a plaintiff claimed under a will, and it was apparent upon the construction of the will that he had no title, a demurrer was allowed (o) (3). But in this case it was said, that if upon arguing the demurrer the court had not been satisfied, and had been therefore desirous that the matter should be more fully debated at a deliberate hearing (p), the demurrer would have

(m) See 2 Sch. & Lefr. 638; Darthez v. Winter, 2 Sim. & Stu. 536;

(n) See Michaux v. Grove, 2 Atk.

(o) Brownsword v. Edwards, 2 Ves. 243. See also Beech v. Crull, tion of a will may be as deliberately

Prec. in Chan. 589; Parker v. Fearnley, 2 Sim. & Stu. 592.

(p) Perhaps this declaration fell from the court rather incautiously; as a dry question upon the construc180

^{(1) [}If, of several complainants, some have an interest in the matter of the suit, and others have no interest in it, but are merely the agents of their co-plaintiffs, a general demurrer to the whole bill is a good defence. King of Spain v. Machado, 4 Russ. 224; and see Cuff v. Platett, 1b. 242; Clarkson v. De Peyster, 3 Paige's C. R. 339.]

⁽²⁾ This disability was abolished by the stat. 10 Geo. IV. c. 7, s, 23.

^{(3) [}See the form of a demurrer, Willis, 154.]

On bill by claimant under a decree of real property, filed for discovery relative thereto and for account, the principle was recognized on demurrer that to entitle himself to a discovery, he must show a perfect prima facie title, before he can call on the party in possession to disclose his. Van Kleek v. The Reformed Du'ch Church, on affirmance of S. C.; The Reformed Dutch Church, V. C., 6 Paige R. 606; et seq. In Error, 20 Wend. R. 458. 507.

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been overruled without prejudice to the defendant's insisting on the same matter by way of answer (q), which indeed it should seem may in all cases be done without the special declaration of the court, that the overruling of the demurrer shall be without prejudice.

Though the plaintiff in a bill may have an interest in the subject, yet if he has not a proper title to institute a suit concerning it, a demurrer will hold (r) (1). Therefore, where persons who had obtained letters of administration of the estate of an intestate in a foreign court, on that ground filed a bill seeking an account of the estate, a demurrer was allowed

determined upon argument of a demurrer as at the hearing of a cause in the ordinary course; and the difference in expense to the parties may be considerable. See above, p. 130, note (n).

(r) It seems the plaintiff must distinctly show a title in equity; for, where one stated a title either at law or in equity, a demurrer was allowed. Edwards v. Edwards, 1 Jac. R. 335.

(q) 2 Ves. 247.

Consent of creditors to a suit by assignees of an insolvent

or bankrupt.

(1) See note, p. 179. The clause in the Insolvent Debtors' Act, 1 Geo. IV. c. 119, s. 11, requiring the consent of the major part in value of the creditors to the institution of a suit, was inserted for the benefit of the creditors alone; so that the want of such consent cannot be urged as an objection by a defendant in a suit by the assignees. Piercy v. Roberts, 1 M. & K. 4. And the same is the case with regard to suits by the assignees of bankrupts. Gerothwohl v. Cochrane, 5 Law J. (N. S.) 47, M. R.

Necessity for plaintiff's showing his title.

Where a person files a bill against the directors of an unincorporated joint-stock company, in respect of a fraud committed by them on the shareholders; and by the rules of the company, as stated in the bill itself, no transfer of shares is to be valid, unless the purchaser shall have been approved of by a board of directors, and shall have executed a proper instrument binding himself to the observance of the regulations of the company; and the plaintiff in such bill alleges that he purchased and is the holder of shares, but he does not set forth his title as purchaser, or state that he had complied with the condition precedent above mentioned; the bill is demurrable on that account. Walburn v. Ingilby, 1 M. & K. 61.

(s), because the plaintiffs did not show by their bill a complete title to institute a suit concerning the subject; for though they might have a right to administration in the proper ecclesiastical court in England, and might therefore really have an interest in the thing demanded by their bill, yet, not showing that they had obtained such administration, they did not show a complete title to institute their suit (1). And where an executor does not appear by his bill to have proved the will of his testator, or appears to have proved it in an improper (t) or insufficient (u) court, as he does not show a complete title to sue as executor, a demurrer will hold (2).

Want of interest in the subject of a suit, or of a title to institute it, are objections to a bill seeking any kind of relief, or filed for the purpose of discovery merely. Thus, though there are few cases in which a man is not entitled to perpetuate the testimony of witnesses, yet if upon the face of the bill the plaintiff appears to have no certain right to or interest in the matter to which he craves leave to examine, in present or in future (x), a demurrer

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⁽s) Tourton v. Flower, 3 P. Wms.

⁽x) Smith v. Att. Gen. in Chan.

Mich. 1777; 6 Ves. 260; Allan v. (t) 3 P. Wms. 371.

⁽u) Comber's Case, 1 P. Wms. Allan, 15 Ves. 130.

⁽¹⁾ Although a prerogative administration must be obtained before money can be paid out of court, and in Young v. Elworthy, 1 M. & K. Want of a pre-rogative admin-215, Sir John Leach held that it was nece-sary to produce a preroga- istration in the tive administration before the decree can be drawn up; yet a suit may be commenced without such an administration, and cannot be stopped by demurrer on account of that circumstance. Metcalfe v. Metcalfe, 1 Keen, 74.

^{(2) [2} Hayward, 157. S. P. as to an administrator. Macnamara v. Sweetman, 1 Hogan, 29. And see the form of a demurrer in such a case, Equity Draft. 84.] 17

will hold. Therefore, where a person claiming as devisee in the will of a person living, but a lunatic, brought a bill to perpetuate the testimony of witnesses to the will against the presumptive heir at law(y); and where persons who would have been entitled to the personal estate of a lunatic if he had been then dead intestate, as his next of kin, supposing him legitimate, brought a bill, in the life-time of the lunatic, to perpetuate the testimony of witnesses to his legitimacy, against the attorney-general as supporting the rights of the crown (z), demurrers were allowed. For the parties in these cases had no interest which could be the subject of a suit; they sustained no character under which they could afterwards use the depositions (a), and therefore the depositions, if taken, would have been wholly nugatory.

So in every case where the plaintiff in a bill shows only the probability of a future title upon an event which may never happen he has no right to institute any suit concerning it; and a demurrer will hold to any kind of bill on that ground which will extend to any discovery as well as to relief (b).

If the claim of the plaintiff is of a matter in itself unlawful, as of money promised to a counsellor

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⁽y) Sackvill v. Ayleworth, 1 Vern. 105; 1 Eq. Ca. Ab. 234; Smith v. Watson, in Chan. 20 June, 1760; 2 Prax. Alm. Cur. Canc. 500, where there is the form of a demurrer. (1).

⁽z) Smith v. Att. Gen. in Chan. Mich. 1777; 6 Ves. 256, 260; 15

Ves. 133, 136.

⁽a) See 2 Prax. Alm. Cur. Can. 501; and see The Earl of Belfast v. Chichester, 2 Jac. & W. 439.

⁽b) Sackvill v. Ayleworth, Vern. 105; 1 Eq. Ca. Ab. 234; Smith v. Att. Gen. Mich. 1777.

^{(1) [}See a better form, note (b), Willis, 452. Also a precedent, in Equity Draft. 85.]

at law for advice and pains in carrying on a suit (c); or of money bequeathed by a will to purchase a dukedom (d); the defendant may demur to the bill, for the plaintiff not having a lawful claim has no title to sue in a court of justice.

There are grounds of demurrer to a bill for a discovery merely as well as to a bill for relief. But if a plaintiff shows a complete title, though a litigated one, or one that may be litigated, as that of an administration, where a suit is depending to revoke the administration (e); or of an administrator where there may be another personal representative (f); a demurrer will not hold, at least to discovery. For in the first case, till the litigation is determined the plaintiff's title is good, and in the second case, the court will not consider the ecclesiastical court as having done wrong. And where a doubtful title only is shown it is necessarily sufficient to support a bill seeking the assistance of the court to preserve property in dispute pending a liti-Therefore where a suit was pending in an ecclesiastical court touching the representation to a person deceased, a demurrer of one of the parties to that suit, who had possessed the personal estate of the deceased, to a bill for an account filed by the other party was overruled (2). The ground of this decision seems to have been the deficient powers of the ecclesiastical court for securing the ef-

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⁽c) Penrice v. Parker, Rep. Temp. Finch. 75; and see Moor v. Rowe, 1 Rep. in Cha. 38; 2 Atk. 332.

⁽d) Earl of Kingston v. Lady Pierepont, 1 Vern. 5.

⁽e) Wright v. Blicke, Ibid. 106.

⁽f) 3 P. Wms. 370.

⁽g) Phipps v. Steward, 1 Atk. 286. And see Andrews v. Powys, 2 Brown, P. C. 504, Toml. Ed. See also Wills v. Rich, 2 Atk. 285; and Morgan v. Harris, 31 Oct. 1786. Demurrer overruled, 2 Bro. C. C. 121.

fects whilst the suit there was depending; and the doubt as to the title of the parties was the very ground of the application to the court.

V. Want of privity between the plaintiff and defendant.

V. A plaintiff may have an interest in the subject of his suit, and a right to institute a suit concerning it, and yet may have no right to call on a defendant to answer his demand. This may be for want of privity between the plaintiff and defendant. Thus, though an unsatisfied legatee has an interest in the estate of his testator, and a right to have it applied to answer his demands in a due course of administration, yet he has no right to institute a suit against the debtors to his testator's estate for the purpose of compelling them to pay their debts in satisfaction of his legacy (h) (1). For there is no privity between the legatee and the debtors, who are answerable only to the personal representative of the testator; unless by collusion between the representative and the debtors, or other collateral circumstance, a distinct ground is given for a bill for the legatee against the debtors (h). So a bill filed by the creditors of a person who was one of the residuary legatees of a testator, against the executors of the testator, the other residuary legatees, and the executrix of their debtor, was dismissed (i) (2).

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March, 1736, Rolls, 12 Nov. 1737; there cited and referred to. 9 Ves. Lord Chan. on Appeal, cited Bar- 86. nard, 32; and 6 Ves. 749; Monk v. (h) 3 Madd. 159. Pomfret, cited ibid.; Alsager v.

(h) Bickly v. Dorrington, 10 Rowley, 6 Ves. 748; and the cases

(i) Elmsley v. M'Aulay, 3 Bro.

^{(1) [}See the form of a demurrer in such a case, Willis, 456; and note (a) there.]

⁽²⁾ Where one of two executors was a partner with the testator, the

But where an agent has been employed, his principal has in many cases a right to a discovery of his transactions, and to demand the property with which he has been intrusted, or the value of it, against those with whom the agent has had dealings; and therefore, where a merchant who had employed a factor to sell his goods filed a bill against the persons to whom the goods had been sold, for an account, and to be paid the money for which the goods had been sold, and which had not been paid to the factor, a demurrer was overruled (k). So where a merchant acting upon a commission del credere became bankrupt, having sold goods of his principals for which he had not paid them, and shortly before his bankruptcy drew bills on the vendees, which he delivered to some of his creditors to discharge their demands, they knowing his insolvency, a suit by the principals was maintained against the persons who had received the bills for an account and payment of the produce. But the book-keeper of the bankrupt having been made a party, as one of the persons to whom bills had been so delivered, and having denied that fact by his answer, he was not compelled to answer to the rest of the bill, which, independent of that fact, was, as to him, a mere bill for discovery of evidence (l).

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C. C. 624. And see Utterson v. Mair, Vernon and others, on demurrer, 10 April, 1793, 2 Ves. Jun. 95; C. 332; 2 Ves. Jun. 457. See Att. S. C. 4 Bro. C. C. 270.

residuary legatees may sustain a bill against the executors for an ac-Bill by a residucount of the partnership transactions, although collusion between them ary legatee against a co-exis neither charged nor proved; for the rule that the legatee cannot sue ecutor as & deba debtor to the estate does not apply to a co-executor who is a debtor to the estate. Cropper v. Knapman, 2 Y. & C. Eq. Ex. 338.

⁽k) Lisset v. Reare, 2 Atk. 394.

⁽¹⁾ Neuman v. Godfrey, 2 Bro. C. Gen. v. Skinner's Comp. 5 Madd.

VI. The plaintiff must by his bill show some claim

VI. Want of interest in the de-

of interest in the defendant in the subject of the suit (m) (1), which can make him liable to the plaintiff's demands, or the defendant may demur (n). Therefore, if a bill is filed to have the benefit of, or to impeach an award, and the arbitrators are made parties, they may demur to the whole bill, as well to discovery as relief (o) (1); for the plaintiff can have no decree against them, nor can he read their answer against the other defendants. Indeed, where an award has been impeached on the ground of gross misconduct in the arbitrators, and they have been made parties to the suit, the court has gone so far as to order them to pay the costs (p); and probably,

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173, particularly at p. 194. But see Cookson v. Ellison, 2 Bro. C. C. 252, and the other subsequent cases on the necessity of answering fully. See below, Chap. 2, sect. 2, part 3.

(m) See Dowlin v. Macdougall, 1 Sim. & Stu. 367.

(n) 2 Eq. Ca. Ab. 78. There are, however, instances in which persons not interested in the subject of dispute, may by their conduct so involve themselves in the transaction relating to it, that they may be held liable to costs; and under such circumstances it seems they cannot demur to the bill, if the fraudulent or improper conduct be charged, and the costs be prayed against them. See 7 Ves. 288; . 14 Ves. 252; Le Texier v. Margravine of Anspach, 15 Ves. 159;

Bowles v. Stewart, 1 Sch. & Lefr. 209; ib. 227; 1 Meriv. 123. And this observation of course applies more strongly where the parties may be interested, but cannot otherwise be made defendants for want of privity. See 3 Barnard, 32; Doran v. Simpson, 4 Ves. 651; 6 Ves. 750; 9 Ves. 86; Salvidge v. Hyde, 5 Madd. 138; S. C. 1 Jac. R. 151.

(o) Steward v. E. I. Comp. 2 Vern. 380. See 14 Ves. 254; Goodman v. Sayers, 2 Jac. & W. 249.

(p) Linguod v. Croucher, 2 Atk. 395; Chicot v. Lequesne, 2 Ves. 315; and the case of Ward v. Periam, cited ib. 316; 1 Turn. R. 131, note ; Lord Lonsdale v. Littledale, 2 Ves. Jun. 451; 14 Ves. 252.

terest.

⁽¹⁾ A mere allegation that a defendant "claims an interest" in the Allegation of (1) A mere anegation that a decision of claiming an in-subject-matter, without showing how or why he so claims, is not sufficient to avoid a demurrer on the ground of a want of interest. Plumbe v. Plumbe, 4 Y. & C. 345.

^{(2) [}See the form of such a demurrer, Willis, 458.]

therefore, in such a case a demurrer to the bill would not have been allowed. A bankrupt made party to a bill against his assignees touching his estate may demur to the relief, all his interest being transferred to his assignees (q); but it seems to have been generally understood, that if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill for the sake of discovery and to assist the plaintiff in obtaining proof, though his answer cannot be read against his assignees; and otherwise the bankruptcy might entirely defeat justice (r). Upon the same principle it seems also to have been considered, that where a person having had an interest in the subject of a bill has assigned that interest, he may yet be compelled to answer with respect to his own acts before the assignment.

It is difficult to draw a precise line between the cases in which a person having no interest may be called upon to answer for his own acts, and those in which he may demur, because he has no interest in the question. Thus, where a creditor who had obtained execution against the effects of his debtor filed a bill against the debtor, against whom a commission of bankrupt had issued, and the persons claiming as assignees under the commission char-

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⁽q) Whitworth v. Davis, 1 Ves. against him, he could not demur, ib. & Bea. 545; S. C. 2 Rose, B. C. and 15 Ves. 164. See also King v. 116; Bailey v. Vincent, 5 Madd. 48; Martin, 2 Ves. Jun. 641. Lloyd v. Lander, 5 Madd. 282; (1) (r) Upon this passage see 1 Ves. but, it seems, that if fraud were charged and costs were prayed

[&]amp; Bea. 548, 549, 550.

^{(1) [}And see Willis on Pleading, note (b), p. 458.]

DEMURRERS.

ging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having by permission of the plaintiff possessed part of the goods taken in execution for the purpose of sale, and instead of paying the produce to the plaintiff had paid it to his assignees, a demurrer by the alleged bankrupt, because he had no interests, and might be examined as a witness, was overruled, and the decision affirmed on rehearing (s). A difference has also been taken where a person concerned in a transaction impeached on the ground of fraud has been made party to a bill for discovery merely (t); or as having the custody of an instrument for the mutual benefit of others (u).

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To prevent a demurrer a bill must in many cases not only show that the defendant has an interest in the subject, but that he is liable to the plaintiff's demands (x). As where a bill was brought upon a ground of equity by the obligee in a bond against the heir of the obligor, alleging that the heir having assets by descent ought to satisfy the bond; because the bill did not expressly allege that the heir was bound in the bond, although it did allege that the heir ought to pay the debt, a demurrer was allowed (y) (1). So where a bill was brought by a lessor against an assignee touching a breach of covenant

⁽s) King v. Martin and others, 25 July 1795, rep. 2 Ves. Jun. 641.

⁽t) Cotton v. Luttrell, Trin. 1738; Bennet v. Vade, 2 Atk. 324: See above, p. 186, note (n). See also Bridgman v. Green, 2 Ves. 627, 629, as to the evidence of a person charged

as particeps criminis, in support of a transaction impeached as fraudulent.

⁽u) 3 Atk. 701.

⁽x) See Ryves v. Ryves, 3 Ves. 343.

⁽y) Crosseing v. Honor, 1 Vern.

^{(1) [}See the form of such a demurrer, Willis, 460.]

in a lease, and the covenant, as stated in the bill, appeared to be collateral, and not running with the land, did not therefore bind assigns, and was not stated by the bill expressly to bind assigns, the assignee demurred, and the demurrer was allowed (z).

VII. If for any reason founded on the substance VII. Want of title to the relief of the case as stated in the bill, the plaintiff is not prayed. entitled to the relief he prays, the defendant may demur. Many of the grounds of demurrer already mentioned are perhaps referable to this head; and in every instance, if the case stated is such that admitting the whole bill to bettrue the court ought not to give the plaintiff the relief or assistance he requires in the whole or in part, the defect thus appearing on the face of the bill is sufficient ground of demurrer (a) (1).

VIII. It is the constant aim of a court of equity VIII. Want of to do complete justice by deciding upon and settling parties. the rights of all persons interested in the subject of [164] the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation (b). For General rule as this purpose all persons materially interested in the to parties.

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¹ Vés. 56.

⁽a) 7 Ves. 245; 2 Sch. & Lefr. 638; 6 Madd. 95.

⁽z) Lord Uxbridge v. Staveland, (b) See Knight v. Knight, 3 P. Wms. 331. But see also Cullen v. Duke of Queensberry, 1 Bro. C. C.

^{(1) [}A demurrer for want of equity cannot be sustained, unless the court is satisfied that no discovery or proof properly called for by, or founded upon the allegations in the bill, can make the subject matter of the suit a proper case for equitable cognizance. Bleeker v. Bingham, 3 Paige's C. R., 246. See the form of a general demurrer for want of equity, Willis, 461.]

subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigations may be prevented (c) (1).

Parties out of the jurisdiction.

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This general rule, however, admits of many qualifications (2). When a person who ought to be a party is out of the jurisdiction of the court (3), that fact being stated in the bill, and admitted by the defendants, or proved at the hearing, is in most cases a sufficient reason for not bringing him before the court;

(c) 3 P. Wms. 333, 334; 2 Atk. 3 Ves. & Bea. 182; 1 Sch. & Lefr. 51; 7 Ves. 563; 12 Ves. 53; 1 298.

Meriv. 262; Beaumont v. Meredith,

Although all persons interested must be made parties to bills for relief, yet this is not necessary as to bills for discovery. Trescott v. Smith, 1 M'Cord's Chan. R. 301. But see Plunket v. Penson, 2 Atk. 51.]

One exception to the general rule, that all materially interested must be parties, is, when a decree in relation to the subject matter in litigation can be made, without a person who has that interest, having that interest in any way concluded by the decree. Where the party is not amenable to the process of the court, or where no beneficial purpose is to be effected by making him a party, such interest must be a right in the subject of controversy which may be affected by a decree in the suit. Story v. Livingston, 13 Peters, 375, 6. 359.

⁽¹⁾ See note on Parties, at the end of the book.

^{(2) [}Wendell v. Van Rensselaer, 1 J. C. R. 349; Wilson v. Hamilton, on appeal, 9 J. R. 442; Haines v. Beach, 3 J. C. R. 459; Ensworth v. Lambert, 4 lb. 605; Trescott v. Smith, 1 McCord's Chan. R. 301; Johnson v. Rankin, 2 Bibb, 184; Newman v. Kendal, 2 Marsh. 234; Pope v. Malone, lb. 240; Hoy v. McMurdy, 1 Litt. 370; Whelan v. Whelan, 3 Cowen, 537; Fellows v. Fellows, 4 lb. 682; Colt v. Lasnier, 9 lb. 320; Edwards on Parties, 1, 2, 3.

⁽³⁾ See note on Parties at the end of the book.

and the court will proceed without him against the other parties, as far as circumstances will permit (d). It is usual, however, to add the name of a person out of the jurisdiction of the court as a party to the bill, so far as may be necessary to connect his case with that of the other parties; and the bill may also pray process against him in case he should become amenable to such process; and if in fact he should become so amenable pending the suit, he ought to be brought before the court either by issuing process against him, if process should have been prayed against him, and if not, by amending the bill for that purpose, if the state of the proceedings will admit of such amendment, or by supplemental bill if they will not (e) (2). If a person so out of the power of the court is required to be an active party in the execution of its decree, as where a conveyance by him is necessary, or if the decree ought to be pursued against him, as the foreclosure of a mortgage against the original mortgagor, or his representative or assign, the proceedings will unavoidably be to this extent defective (f). A foreign

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v. Cely, Prec. in Chan. 83; Darwent v. Walton, 2 Atk. 510; Williams v. Whinyates, 2 Bro. C. C. 2 Sim. & Stu. 219. 399 (1); and, if the disposition of the property be in the power of the other 277; see above, p. 34.

(d) 1 Ves. 385; and see Cowslad parties, the court, it seems, will act upon it; 1 Sch. & Lefr. 240.

- (e) See Haddock v. Thomlinson,
- (f) Fell v. Brown, 2 Bro. C. C.

Prayer of pro-

^{(1) [}Milligan v. Milledge, 3 Cranch, 220; Lavihart v. Reilly, 3 Desau, 590.]

⁽²⁾ Where a defendant is out of the jurisdiction, it is usual and expedient to pray that process may issue against him when he shall come within the jurisdiction, but the omission of his name in the prayer of process does not render the record defective. Haddock v. Thomlinson, 2 S. & S. 219.

corporation not amenable to the jurisdiction of the court falls within this description, and a corporation in Scotland is considered for this purpose as a foreign corporation (g).

General rule as to parties to a suit to charge the personal property of a deceased party, or a suit on behalf of many persons in the same interest.

When the object of a suit is to charge the personal property of a deceased person with a demand, it is generally sufficient to bring before the court the person constituted by law to represent that property, and to answer all demands upon it (1); and the difficulty of bringing before the court, in some cases, all the persons interested in the subject of a suit, has also induced the court to depart from the general rule (h), where the suit is on behalf of many in the same interest, and all the persons answering that description cannot easily be discovered or ascertained (1). Thus a few creditors may substantiate a suit on behalf of themselves and the other creditors (1) of their deceased debtor, for an account

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Parties to a cre-ditor's suit.

as to the University of Glasgow.

v. Belchier, 4 Ves. 627; Lloyd v. Loaring, 6 Ves. 773; 11 Ves. 367; 429; Cockburn v. Thompson, 16

(g) Att. Gen. v. Baliol Coll. in Ves. 321; Beaumont v. Meredith, 3 Ch. 10 Dec. 1744; Lord Hardwicke, Ves. & Bea. 180; Meux v. Maltby, 2 Swanst. 277, and cases there cited; (h) Prec. in Chan. 592; Pearson and see below, 196, notes (u) and (x); Ellison v. Bignold, 2 Jac. & W. 503; Manning v. Thesiger, 1 Adair v. New River Comp. 11 Ves. Sim. & Stu. 106; Gray v. Chaplin, 2 Sim. & Stu. 267.

⁽¹⁾ See note on Parties at the end of the book.

Wiser v. Bla hly, 1 J. C. R. 437; Brown v. Ricketts, 3 Ib. 553; Colt v. Lasnier, 9 Cowen's R. 320.]

Where complainants are regularly and properly united in seeking satisfaction from subjects against which as creditors of the defendants, they can properly claim, the bill is a creditor's bill. It is not irregular for two sets of creditors, two mercantile firms, to unite as complainants in equity, in a creditor's bill; and where some of the members of those firms were common to both, the bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms; and also against the surviving partner of one of the The creditor of a partnership may at his option proceed

and application of his assets, real as well as personal, in payment of their demands (1) (i); and the decree being in that case applied to all the creditors, the other creditors may come in under it and obtain satisfaction of their demands equally with the plaintiffs in the suit; and if they decline to do so, they will be excluded the benefit of the decree, and will yet be considered as bound by acts done under its authority (k). As a single creditor may sue for his demand

(i) 2 Ves. 313; Law v. Rigby, 4 Bro. C. C. 60 (1). (k) See Good v. Blewitt, 19 Ves. 336, and Angell v. Haddon, 1 Madd. R. 529 (3).

at law against the surviving partner, or go in the first instance into equity against the representatives of deceased partner. It is not necessary for him to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate of the deceased. Nelson et al. v. Hill et al. 5 Howard R. 127. 131. 133, 4.

(1) But in this as in all other cases where some persons may come into court as plaintiffs for themselves, and others having similar interests, those who by name bring the suit and constitute the parties on record must have themselves an interest in the subject matter which enables them to sue, and the others are treated as a kind of co-plaintiffs, though not named; but whereas in case of a public corporation filing a bill on behalf of themselves and the citizens of the place, alleging a public nuisance and asking an injunction, it was held, the corporation not having shown that they were the owners of the property liable to be affected by the nuisance and were so affected, so as that they had suffered a special damage, and not merely as a corporate authority to take care of and protect the interests of the citizens, had no such interest as enabled them to sue in their own name. City of Georgetown v. Alexandria Canal Company, &c., 12 Peters, 91.

(2) [Hendricks v. Robinson, 2 J. C. R. 283; Brown v. Ricketts, 3 Ib. 553; Brinkerhoff v. Brown, 6 Ib. 139; see the last case considered in Fellows v. Fellows, 4 Cowen's R. t82; and see Fish v. Howland, 1 Page's C. R. 20; Egberts v. Wood, 3 Paige's C. R. 517; Burney v.

Morgan, 1 S. & S. 358.]

(3) [And see Neve v. Weston, 3 Atk. 557; Young v. Everest, 1 Russ. & M. 426; Shubrick v. Shubrick, 1 M'Cord's C. R. 407. To enable a creditor to come in under a decree and prove a claim which is not stated or referred to in the pleadings or proofs in the cause, he

out of personal assets, it is rather matter of convenience than of indulgence to permit such a suit by a few on behalf of all the creditors; and it tends to prevent several suits by several creditors, which might be highly inconvenient in the administration of assets, as well as burthensome on the fund to be administered; for if a bill be brought by a single creditor for his own debt, he may as at law gain a preference by the judgment in his favour over other creditors in the same degree, who may not have used equal diligence (1).

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But some of a number of creditors, parties to a trust-deed for payment of debts, have been permited to sue on behalf of themselves and the other creditors named in the deed for execution of the trust (m), although one of those creditors could not in that case have sued for his single demand without bringing the other creditors before the court. This seems to have been permitted purely to save ex-

(l) See Att. Gen. v. Cornthwaite, 2 Cox, R. 44; an instance of a bill by a single creditor (1). And see Haycock v. Haycock, 2 Ca. in Cha. 124; Bedford v. Leigh, Dick. 707; Hall v. Binney, 6 Ves. 738.

(m) Corry v. Trist, 1 Dec. 1766;
Routh v. Kinder, 3 Swanst. 144,
n.; Boddy v. Kent, 1 Meriv. 361;
Weld v. Bonham, 2 Sim. & Stu. 91; Handford v. Storie, 2 Sim. & Stu. 196.

should present the particulars of his claim to the master, accompanied by his affidavit in support thereof. In this affidavit, the claimant must swear either positively or according to his information and belief, that the amount claimed is justly due as set forth in the particular of his claim, and that neither the claimant, nor any person by his order or to his knowledge or belief for his use hath received the amount thus claimed or any part thereof or any security or satisfaction whatsoever for the same or any part thereof. *Morris* v. *Mowatt*, 4 Paige C. R. 142, and see Rule 105, N. Y. Chancery.]

^{(1) [}And see Hendricks v. Robinson, 2 J. C. R. 283; Corning v. White, 1 Paige's C. R. 567.]

pense and delay. If a great number of creditors, thus specially provided for by a deed of trust, were to be made plaintiffs, the suit would be liable to the hazard of frequent abatements; and if many were made defendants, the same inconvenience might happen, and additional expense would unavoidably be incurred.

By analogy to the case of creditors, a legatee is Parties to a suit permitted to sue on behalf of himself and other legatees (1); and as he might sue for his own legacy only, a suit by one on behalf of all the legatees has the same tendency to prevent inconvenience and expense as a suit by one creditor on behalf of all creditors of the same fund (n); but in a suit by a single legatee for his own legacy, unless the personal representative of the testator, by admitting assets for payment of the legacy, warrants an immediate personal decree against himself, by which he alone will be bound(o), the court will direct a general account of all the legacies of the same testator, and payment of the legacy claim ratably only with the other legacies, no preference being allowed amongst legatees in the administration of assets (p).

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generally, (see 2 Ca. in Cha. 124 (3);

Sadler, 1 Cox, R. 352 (2).

⁽o) See Boys v. Ford, 4 Madd. 40. Ves. Jun. 311; 1 Madd. R. 448,) nor

⁽p) To a bill by a specific or pecuniary legatee for payment, neither and see Morse v. Sadler, 1 Cox, R.

⁽n) 6 Ves. 779; and see Morse v. the residuary legatees, (see 1 Vern. 261; Wainwright v. Waterman, 1

⁽¹⁾ See note on Parties at the end of the book.

^{(2) [}Brown v. Ricketts, 3 J. C. R. 553; Fish v. Howland, 1 Paige's C. R. 20; Prischard v. Hicks, Ib. 270; Ross v. Crary, Ib. 416; Hallett v. Hallett, 3 Ib. 15.]

⁽¹⁾ Also Ib. 228; West v. Randall, 2 Mason's R. 181; Pritchard v. Hicks, 1 Paige's C. R. 270.

When the court has pronounced a decree for an account and payment of debts or legacies under which all creditors or legatees may claim, it will restrain subsequent proceedings by a separate creditor or legatee, either at law or in equity, as the just administration of the assets would be greatly embarrassed by such proceedings (p).

Parties to a suit by parishioners.

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Where all the inhabitants of a parish had rights of common under a trust, a suit by one on behalf of himself and the other inhabitants was admitted (q). It has been doubted whether the attorney-general ought not to have been a party to that suit (r), and accordingly, on a bill filed by some of the sufferers by a fire against the trustees of a collection made for the sufferers generally, it was objected at the hearing, that the attorney-general ought to have been a party, and that otherwise the decree would not be conclusive: and the cause was accordingly ordered to stand over for the purpose of bringing the attorney-general before the court (s). But where a bill was brought for distribution of private contributions the

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352), any other of the legatees, need be made parties; but on such a bill by one of several residuary legatees, he must in general bring before the court all the other persons interested in the residue, after satisfaction of the creditors and the specific and pecuniary legatees. 2 Ca. in Cha. 124; Parsons v. Neville, 3 Bro. C. C. 365; 16 Ves. 328. And see 1 Sim. & Stu. 106.

(p) 1 Sch. & Lefr. 299, and cases cited there, in note (b); and see Douglas v. Clay, Dick. 393; Brooks v Reynolds, Dick. 603; S. C. 1 Bro. C. C. 183; Rush v. Higgs, 4 Ves.

638; Paxton v. Douglas, 8 Ves. 520; Terrewest v. Featherby, 2 Meriv. 480; Currie v. Bowyer, 3 Madd. 456; Farrel v. Smith, 2 Ball & B. 337; 1 Jac. R. 122; Lord v. Wormleighton, 1 Jac. R. 148.

- (q) 1 Ca. in Cha. 269. Blackham v. the Warden and Society of Sutton Coldfield. See Att. Gen. v. Heelis, 2 Sim. & Stu. 67.
- (r) See Att. Gen. v. Moses, 2Madd. R. 294.
- (s) Overall v. Peacock, 6 Dec. 1737. See Wellbeloved v. Jones, 1 Sim. & Stu. 40.

objection that the attorney-general was not a party was overruled (t) (1).

For the application of personal estate amongst by a next of kin, next of kin, or amongst persons claiming under a only or by or against others claiming general description, as the relations of a testator or description. other persons, where it may be uncertain who are all the persons answering that description, a bill has been admitted by one claimant on behalf of himself and the other persons equally entitled (u) (1), and the necessity of the case has induced the court, especially of late years, frequently to depart from the general rule, where a strict adherence to it would probably amount to a denial of justice; and to allow a few persons to sue on behalf of great numbers having the same interest (x) (1).

MS. N. reported 2 Atk. 84; but this point is not noticed by Atkyns. Nutt v. Brown, 20 July 1745; Anon. 3 Atk. 227; 1 Sim. & Stu. 43. The attorney or solicitor-general is usually pp. 23, 120.

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(x) Chancey v. May, Prec. in 1 Atk. 284; Leigh v. Thomas, 2 Ves. v. Moore, 1 Russ. R. 441 (4).

(t) Lee v. Carter, 17 Nov. 1740, 312; Pearson v. Belchier, 4 Ves. 627; Lloyd v. Loaring, 6 Ves. 773; Good v. Blewitt, 13 Ves. 397; Cockburn v. Thompson, 16 Ves. 321; 3 Meriv. 510; Manning v. Thesiger, 1 Sim. & Stu. 106; Baldwin v. Lawa necessary party to suits relating to rence, 2 Sim. & Stu. 18; Gray v. charity funds. See Wellbeloved v. Chaplin, 2 Sim. & Stu. 267 (3); but Jones, 1 Sim. & Stu. 40; and above, it seems that except, perhaps, in the . common cases of this kind, it is (u) See Ambl. 710; 1 Russ. R. necessary to allege that the parties are too numerous to be individually named, Weld v. Bonham, 2 Sim. & Chan. 592 (Finch Ed.); Gilb. 230; Stu. 91; see, however, Van Sandau

⁽¹⁾ See note on Parties at the end of the book.

⁽²⁾ But for the practice in ordinary cases, see note (0), on the last

^{(3) [}S. C. on appeal, 2 Russ. 126; Hallett v. Hallett, 2 Paige's C. R. 15.]

^{(4) [}Also Hitchens v. Congreve, 1 Sim. 500; S. C. on appeal, 4 Russ. 562; Wendell v. Van Rensselaer, 1 J. C. R. 349. And such

There are also other cases in which the interests of persons not parties to a suit may be in some degree affected, and yet the suit has been permitted to proceed without them, as a bill brought by a lord of a manor against some of the tenants, or by some of the tenants against the lord, on a question of common; or by a parson for tithes against some of the parishioners, or by some of the parishioners against the parson, to establish a general parochial modus (x).

Persons consequentially interested;

[171] as creditors,

In many cases the expression that all persons interested in the subject must be parties to a suit, is not to be understood as extending to all persons who may be consequentially interested. Thus, in the case of a bill which may be brought by a single creditor for satisfaction of his single demand out of the assets of a deceased debtor, as before noticed (1), although the interest of every other un-

(x) 1 Atk. 283; 3 Atk. 247; Chaytor v. Trin. Coll. Anst. 841; 11 Ves. 444; and see Adair v. New River Comp. 11 Ves. 429; 16 Ves. 328; 1 Jac. & W. 369; 2 Swanst. 282; but it appears that where it is attempted to proceed against some individuals

representing a numerous class, as against churchwardens representing the parishioners in respect of a church-rate, it must be alleged that the suit is brought against them in such representative character. 5 Madd. 13.

bill may be filed by some, even though the illegal acts complained of may be sanctioned by the majority. Bromley v. Smith, 1 Sim. 8.

Some of the members of a partnership cannot file a bill, on behalf of themselves and the others for a dissolution of the partnership; but all the members, however numerous, must be parties to the suit. Long v. Yonge, 2 Sim. 369; and see Macmahon v. Upton, lb. 473. As where one of several partners received a mortgage in his own name for a partnership debt, and afterwards brought a bill in his separate capacity to foreclose the equity of redemption:—Held, on demurrer, that the other partners ought to have joined. Noyes v. Sawyer, 3 Vermont R. 160,]

^{(1) [}At page 166.]

satisfied creditor may be consequentially affected by the suit, yet that interest is not deemed such as to require that the other creditors should be parties; notwithstanding, the decree if fairly obtained will compel them to admit the demand ascertained under its authority as a just demand, to the extent allowed by the court in the administration of assets; but they will not be bound by any account of the assets taken under such a decree. So in all cases of bills and persons interested after by creditors or legatees, the persons entitled to the debts and legatees. personal assets of a deceased debtor or testator, after payment of the debts or legacies, are not deemed necessary parties, though interested to contest the demands of the creditors and legatees: and if the suits be fairly conducted, they will be bound to allow the demands admitted in those suits by the court, though they will not be bound by any account of the property taken in their absence (y).

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To a bill to carry into execution the trusts of a Parties to a suit to carry into execution the carry into execution the will disposing of real estate by sale or charge of trusts of a will the estate, the heir at law of the testator is deemed a necessary party, that the title may be quieted against his demand (1); for which purpose the bill usually prays that the will may be established against [172] him by the decree of the court; but if the testator has made a prior will containing a different disposition of the same property, and which remains uncancelled, and has not been revoked except by the

⁽y) See the case of Bedford v. wright v. Waterman, 1 Ves. Jr. 313; Leigh, Dick. 707. And see Lawson Brown v. Dowthwaite, 1 Madd. R. v. Barker, 1 Bro. C. C. 303; Wain- 448.

⁽¹⁾ See note on Parties at the end of the book.

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subsequent will, it has not been deemed necessary to make the persons claiming under the prior will parties; though if the subsequent will be not valid, those persons may disturb the title under it as well as the heir of the testator. If, however, the prior will is insisted upon as an effective instrument notwithstanding the subsequent will, the persons claiming under it may be brought before the court, to quiet the title, and protect those who may act under the orders of the court in executing the latter instrument (z).

If no heir at law can be found, the king's attorneygeneral is usually made a party to a bill for carrying the trusts of a devise of real estate into execution, supposing the escheat to be to the crown, if the will set up by the bill should be subject to impeachment (a). But if any person should claim the escheat against the crown, that person may be a necessary party.

If the heir at law of a testator who has devised a real estate on trusts should be out of the jurisdiction of the court, and that fact should be charged and proved, the court will proceed to direct the execution of the trusts upon full proof of the due execution of the will and sanity of the testator; though that evidence cannot be read against the heir if he should afterwards dispute the will, and the court therefore

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⁽a) See the case of Att. Gen. v. (z) See on the general subject, Harris v. Ingledew, 3 P. Wms. 91; Mayor of Bristol, 3 Madd. 319; S. C. Lewis v. Naugle, 2 Ves. 431; 1 Ves. 2 Jac. & W. 294. Jun. 29 (1).

^{(1) [}Also Jackson v. Radford, 4 Price, 274; Fordham v. Rolfe, 1 Tamlyns, C. R. 1; Wiser v. Blachly, 1 J. C. R. 437.]

cannot establish the will against him, or in any manner ensure the title under it against his claims (b)(1).

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Where real property in question is subject to an entail, it is generally sufficient to make the first the property is subject to such person in being, in whom an estate of inheritance cessive estates. is vested, a party with those claiming prior interests, omitting those who may claim in remainder or reversion after such vested estate of inheritance (c); and a decree against the person having that estate of inheritance will bind those in remainder or reversion, though by failure of all the previous estates the estates then in remainder or reversion may afterwards vest in possession (d). It has therefore been determined that a person so entitled in remainder, and afterwards becoming entitled in possession, may appeal from a decree made against a person having a prior estate of inheritance, and cannot avoid the effect of the decree by a new bill (e).

Contingent limitations and executory devises to persons not in being may in like manner be bound by a decree against a person claiming a vested estate of inheritance; but a person in being claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance by

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Bro. C. C. 399; and see French v. Baron, 2 Atk. 120; S. C. Dick, 138.

⁽c) 2 Sch. & Lefr. 210; and see Anon. 2 Eq. Ca. Ab. 166; 2 Ves. 492; Pelham v. Gregory, 1 Eden, R.

⁽b) See Williams v. Whinyates, 2 518; S. C. 3 Bro. P. C. 204, Toml. Ed. (d) See Lloyd v. Johnes, 9 Ves. 37; 16 Ves. 326.

⁽e) Giffard v. Hort, 1 Sch. & Lefr. 386, ib. 411.

⁽¹⁾ A decree for establishing a will and executing the trusts thereof, Bill by heir immay be impeached by an original bill by the heir at law in case he was peaching a denote served with a subpæna, though named as a party defendant to the a will. bill in the cause in which such decree was made. He need not file a supplemental bill in that cause. Waterton v. Croft, 6 Sim. 431.

which it may be defeated, must be made a party to a bill affecting his rights (f) (1).

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If a person entitled to an interest prior in limitation to any estate of inheritance before the court, should be born pending the suit, that person must be brought before the court by a supplementary proceeding. And if by the determination of any contingency a new interest should be acquired, not subject to destruction by a prior vested estate of inheritance, the person having that interest must be brought before the court in like manner. And if by the death of the person having, when the suit was instituted, the first estate of inheritance, that estate should be determined, the person having the next estate of inheritance, and all the persons having prior interests, must be so brought before the court (g).

Parties to suits respecting real estates charged debts.

Trustees of real estate for payment of debts or estates charged legacies may sustain a suit, either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom they are trustees, which in many cases would be almost impossible; and the rights of the creditors or legatees will be bound by the decision of the court against the trustees (h) (1).

⁽f) See Handcock v. Shaen, Coll. P. C. 122; and Anon. 2 Eq. Ca. Ab. 166; Sherrit v. Birch, 3 Bro. C. C.

⁽h) See Franco v. Franco, 3 Ves. 75; and see Curteis v. Candler, 6 Madd. 123. [Bifield v. Taylor, 1 Beatty's R. 91.]

⁽g) See 2 Sch. & Lefr. 210.

⁽¹⁾ See note on Parties at the end of the book.

⁽¹⁾ In Harrison v. Stewardson, Sir James Wigram, V. C., observed, "It is impossible to say that the practice of the court is in conformity with this passage; for almost the universal rule is to make legatees parties where legacies are charged on real estate." 2 Hare, 532. And see note on Parties at the end of the book.

The interests of persons claiming under the pos- Tenants. session of a party whose title to real property is dis- [175] 202 puted, as his occupying tenants (1), under leases, are not deemed necessary parties; though if he had a legal title, the title which they may have gained from him cannot be prejudiced by any decision on his rights in a court of equity in their absence; and though if his title was equitable merely, they may be affected by a decision against that title (1). Sometimes, if the existence of such rights is suggested at the hearing, the decree is expressly made without prejudice to those rights, or otherwise qualified according to circumstances. If therefore it is intended to conclude such rights by the same suit, the persons claiming them must be made parties to it; Incumbrancers. and where the right is of a higher nature, as a mortgage, the person claiming it is usually made a party (i) (2).

To a suit for the execution of a trust, by or against to prior charges, or to a surplus those claiming the ultimate benefit of the trust, after after payment of prior charges. the satisfaction of prior charges, it is not necessary to bring before the court the persons claiming the benefit of such prior charges; and therefore, to a bill for the application of a surplus paid after payment of debts and legacies, or other prior incumbrance, the

(i) See 2 Ves. 450. [Also Capis v. Middleton, 2 Madd. R. 410.]

^{(1) [}Where a receiver is appointed, the ordinary direction is that the tenant attorn. If application be made to persons to attorn, and they refuse, the course is not to make them parties: but to move that they should attorn; and then such persons must come in and inform the court whether they are tenants or not. Reid v. Middleton, 1 Turn. & R. 455.]

⁽²⁾ See note on Parties at the end of the book.

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creditors, legatees, or other prior incumbrancers, need not be made parties (k) (1). And persons having demands prior to the creation of such a trust may enforce those demands against the trustees without bringing before the court the persons interested under the trust, if the absolute disposition of the property is vested in the trustees (1). But if the trustees have no such power of disposition, as in the case of trustees to convey to certain uses, the persons claiming the benefit of the trust must also Persons having be parties (2). Persons having specific charges on on trust proper. the trust-property in many cases are also necessary parties; but this will not extend to a general trust for creditors or others whose demands are not distinctly specified in the creation of the trust, as their number, as well as the difficulty of ascertaining who may answer a general description, might greatly embarrass a prior claim against a trust-

Parties to a suit as to the real as-

If a debt by a covenant or obligation binding the sets of a debtor. heir of the debtor is demanded against his real assets

> (k) See Anon. 3 Atk. 572. [Also Calverley v. Phelp, 6 Madd. 228; James v. Biou, 2 S. & S. 600; Wallace v. Smith, 1 Beatty, 385.]

property (l).

(l) As to cestui que trusts being parties, see Kirk v. Clark, Prec. in Chan. 275; Adams v. St. Leger, 1 Ball & B. 181; Calverly v. Phelp, 6 Madd. 229; Douglas v. Horsfall, 2 Sim & Stu. 184 (3). It may here be observed, that if the trust-property be personal, and its amount be ascertained, one entitled to an aliquot part thereof may sue the trustees for the same, without making the persons claiming the other shares thereof parties to the suit. Smith v. Snow, 3 Madd. 10 (1).

⁽¹⁾ See note on Parties at the end of the book.

^{(2) [}Fish v. Howland, 1 Paige's C. R. 20.]

⁽³⁾ Malin v. Malin, 2 J. C. R. 238; Hickock v. Scribner, 3 J. C. 311; Johnson v. Hart, Ib. 322; Elliot's executor v. Drayton, 3 Desau. C. R. 29; Taylor v. Mayrant, 4 Ib. 505; Marshall v. Beverly, 5. Wheaton, 313.]

in the hands of a devisee under the statute 3 & 4 W. & M. c. 14, the heir must always be a party (m); and if any assets have descended to the heir they are first applicable, unless the assets devised are charged with debts in exoneration of the heir. The personal representative of the deceased debtor is also generally a necessary party (n), as a court of equity will first apply the personal, in exoneration of the real assets (2). When there has been no general personal representative, a special repre-intraction, and persentative by an administration limited to the subject ted in England. of the suit has been required. In other cases where a demand is made against a fund entitled to exoneration by general personal assets, if there are any such, a like limited administrator is frequently required to be brought before the court. This seems to be required rather to satisfy the court that there are no such assets to satisfy the demand: for although the limited administrator can collect no such assets by the authority under which he must act, yet as the person entitled to general administration must be cited in the ecclesiastical court before such limited administration can be obtained, and as the limited administration would be determined by a subsequent grant of general administration, it must be presumed that there are no such

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⁽m) Gawler v. Wade, 1 P. Wms. 100; Warren v. Stawell, 2 Atk. 331; 3 P. Wms. 350; 3 Atk. 406; 125 (1).

⁽n) Knight v. Knight, 3 P. Wms. 1 Eq. Ca. Ab. 73; Dowe v. Farlie, 2 Madd. R. 101; 2 Sim. & Stu. 292.

⁽¹⁾ See the Revised Statutes of the State of N. Y., as to suits by creditors against heirs. 2d vol. p. 454, § 42, et seq.]

⁽²⁾ See note on Parties at the end of the book.

assets to be collected, or a general administration would be obtained (o) (3).

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The personal representative thus brought before the court must be a representative constituted in England; and although there may be personal assets in another country, and a personal representative constituted there, yet as he may not be amenable to the process of the court, and those assets must be subject to administration according to the laws of that country, such a representative is not deemed a necessary party to substantiate a demand against the real assets in England (p) (3).

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Where a claim on property in dispute would vest in the personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit may be necessary to enable the court to proceed to a decision on the claim; and when a right is clearly vested, as a trust-term which is required to be assigned, an administration of the effects of the deceased trustee limited to the trust-

⁽a) See the case of Glass v. Oxenham, 2 Atk. 121 (1). Where probate has been granted, and the executor has subsequently departed out of the realm, a special administration may, after twelve months from the decease of the testator, be obtained to defend a suit, or to carry a decree into exe-

cution, by virtue of stat. 38 Geo. III. c. 87. Rainsford v. Taynton, 7 Ves. 460 (2).

⁽p) See Jauncy v. Sealey, 1 Vern. 397; and Lowe v. Farlie, 2 Madd. R. 101; Logan v. Farlie, 2 Sim. & Stu. 284.

⁽¹⁾ See also Colt v. Lasnier, 9 Cowen's R. 320.]

^{(2) [}Provision is made by the Revised Statutes of the State of New-York for the appointment of an administrator with the will annexed upon the departure or incompetency of an executor. 2d vol. 72, § 18, 19, 20, 21, 22.]

⁽³⁾ See note on Parties at the end of the book.

term is necessary to warrant the decree of the court for assignment of the term.

In some cases, when it has appeared at the hear-presentative of a cause, that the personal representative of a party to a bill. deceased person, not a party to the suit, ought to be privy to the proceedings under a decree, but that no question could arise as to the rights of such representative on the hearing, the court has made a decree directing proceedings before one of the masters of the court, without requiring the representative to be made a party by amendment or otherwise; and has given leave to the parties in the suit to bring a representative before the master on taking the accounts or other proceedings directed by the decree, which may concern the rights of such representative; and a representative thus brought before the master is considered as a party to the cause in the subsequent proceedings (p).

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In most cases the person having the legal title in Legal owner. the subject must be a party, though he has no beneficial interest, that the legal right may be bound by the decree of the court (q) (1). Thus if a bond or Assignor. judgment be assigned, the assignor as well as the assignee must be a party, for the legal right of action remains in the assignor (r).

⁽p) See Fletcher v. Ashburner, 1 Bro. C. C. 497; 1 Ves. Jun. 69.

⁽q) As to the case of a trustee, see Prec. in Chan. 275; 3 Barnard, 325; Burt v. Dennet, 2 Bro. C. C. 225; 7 Ves. 11; Cholmondeley v. Clinton, 2 Meriv. 71.

⁽r) See Cathcart v. Lewis, 1 Ves. Jun. 463; but see Brace v. Harrington, 2 Atk. 235; and Blake v. Jones,

³ Anstr. 651. See also Ryan v. Anderson, 3 Madd. 174; Edney v. Jewell, 6 Madd. 165; 2 Sim. & Stu. 253 (2).

⁽¹⁾ See note on Parties at the end of the book.

^{(2) [}Also Edmeston v. Lyde, 1 Paige's C. R. 637; Saunders v. Macey, 4 Bibb's R. 458, 543; Allen v. Crockett, Ib. 240; and see Edwards on Parties, 81.]

Difficult to determine who are necessary parties.

In some cases, however, it may still remain a question of considerable difficulty who are necessary parties to a suit. It may indeed be doubtful until the decision of the cause what interests may be affected by that decision; and sometimes parties must be brought before the court to litigate a question, who had, according to the decision, no interest in the subject; and as to whom therefore, whether plaintiffs or defendant, the bill may be finally dismissed, though the court may make a decree on the subject as between other parties, which will be conclusive on the persons as to whom the bill may be so dismissed, but which the court would not pronounce in their absence, if amenable to its jurisdiction.

Parties dispensed with by

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Sometimes, too, a plaintiff, by waiving a partiwaiving a claim cular claim, may avoid the necessity of making parties who might be effected by it, though that claim might be an evident consequence of the rights asserted by the bill against other parties. however, cannot be done to the prejudice of others (1).

Demurrer for want of parties avoided.

Whenever a want of parties appears on the face of a bill, the want of proper parties is a cause of

^{(1) [}The examples given by Lord Redesdale, as to parties, amount to merely a tithe part of the reported cases, and embrace only some of the leading principles in relation to them. The subject is a wide and most important one; and has been attempted to be reduced to practical use by Charles Edwards, Esq., On Parties to Bills and other Pleadings in Chancery. For a collection of English and American cases, see note on Parties at the end of the book. See also Calvert on Parties to Bills in Chancery, a valuable English treatise on that subject which has recently passed to a second edition.

demurrer (s) (2). But if a sufficient reason for not bringing a necessary party before the court is suggested by the bill (3); as if a personal representative is a necessary party, and the representations charged to be in litigation in the ecclesiastical court (t); or if the bill seeks a discovery of the parties interested in the matter in question for the purpose of making them parties, and charging that they are unknown to the plaintiff; a demurrer for want of the necessary parties will not hold (u).

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- (s) Clark v. Lord Angier, 1 Ca. in Chan. 41; Nels. R. 78, 93; Astley v. Fountaine, Finch, R. 4; Weston v. Keighley, Finch, R. 82; Atwood v. Hawkins, Finch, R. 113; Galle v. Greenhill, Finch, R. 202; 3 P. Wms. 311, note; Knight v. Knight, 3 P. Wms. 331; 2 Atk. 570; 1 Eq. Ca. Ab. 72; 2 Eq. Ca. Ab. 165; Cockburn v. Thompson, 16 Ves. 321; Cook v. Butt, 6 Madd. 53; Weld v. Bon- v. Frost, 3 Madd. 1. ham, 2 Sim. & Stu. 91; Gray v. Chaplin, 2 Sim. & Stu. 267; Maule v. Duke of Beaufort, 1 Russ. R. 349
- (1). Quære, whether a demurrer for want of parties should be to the whole bill. See E. I. Company v. Coles, reported 3 Swanst. 142, note; and see the cases of Atwood v. Hawkins, Finch, R. 113; Astley v. Fountaine, Finch, R. 4; and Bressenden v. Decreets, 2 Ca. in Chan. 197, cited 3 Swanst. 144, note.
 - (t) 2 Atkyns, 51; and see Jones
 - (u) Bowyer v. Covert, 1 Vern. 95; Heath v. Percival, 1 P. Wms. 682,

⁽¹⁾ Crane v. Deming, 7 Day, 387; Mitchell v. Lenox, 2 Paige's C. R. 280; Robinson v. Smith, 3 lb. 222.]

⁽²⁾ Elmendorf v. Taylor, 10 Wheat. 152. See the form of a demurrer for want of parties, Willis, 462, and note (b) there.]

But if the objection do not appear on the face of the bill, the proper mode to take advantage of it is by plea or answer. If a misjoinder of complainants by demurrer or answer, it is too late to urge a formal objection of this kind at hearing. Story v. Livingston, 13 Peters, 375, 360.

⁽³⁾ In order to dispense with making a person a defendant, it is not Allegation as to sufficient to allege that he absconded a year before the bill was filed; person having absconded. for he might have returned before the filing of the bill. Penfold v. Nunn, 5 Sim. 405.

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A demurrer for want of parties must show who show who are the proper parties: not indeed by name, for tles. that might be impossible; but in such manner as to point out to the plaintiff the objection to his bill, and enable him to amend by adding the proper parties (x) (1). In case of a demurrer for want of parties, the court has permitted the plaintiff to amend, when the demurrer has been held good upon argument (y) (3).

IX. Multifariousness.

IX. The court will not permit a plaintiff to demand, by one bill, several matters of different natures against several defendants (z); for this would tend to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connection. A defendant may therefore demur, because the plaintiff

(x) Upon this subject see 6 Ves. (y) Bressenden v. Decreets, 2 Ch. 781; 11 Ves. 369; 16 Ves. 325; 3 Ca. 197. (z) See 5 Madd. 146 (3). Madd. 62.

⁽¹⁾ Lund v. Blanshard, 4 Hare, 23.

⁽²⁾ See the form of a demurrer for want of parties. Equity Draft. 81; Edwards on Parties, 275.]

⁽³⁾ Garlick v. Strong, 3 Paige's C. R. 440. It was said, in Gibbs v. Clagett, 2 Gill & Johns. 14, that the ground of multifariousness should be raised by a demurrer, before answer; and that filing an answer and going into testimony was a waiver of the objection. S. P. Ward v. Cooke, 5 Madd. 122.

A party in a divorce cause, cannot set up cruelty and adultery, and pray for a separation from bed and board for ever, and also for a decree dissolving the marriage contract. A demurrer would hold to such a bill, on the ground of multifariousness. This has been distinctly decided by Chancellor Walworth, in Smith v. Smith, 4 Paige 92. And the bill was ordered to be dismissed, with costs, to be paid by the next friend. The same rule had been laid down by V. C. M'Coun, in Mulock v. Mulock, 1 Edwards' V. C. Rep. 14.]

demands several matters of different natures of several defendants by the same bill(a)(4).

(1). And, as late instances of de- Madd. 94; Kaye v. Moore, 1 Sim. & murrers for multifariousness, see Ward Stu. 61; Dew v. Clarke, 1 Sim. & v. Cooke, 5 Madd. 122; Salvidge v. Stu. 108; Turner v. Robinson, 1 Sim. Hyde, 5 Madd. 138; S. C. 1 Jac. R. & Stu. 313 (2), and Shackell v. Ma-153; Turner v. Doubleday, 6 Madd. caulay, 2 Sim. & Stu. 79 (3).

(a) Berke v. Harris, Hardr. 337 94; Exeter Coll. v. Rowland, 6

(1) [Fellows v. Fellows, 4 Cowen's R. 682. The rule that multifarious matters shall not be joined in the same suit, is a rule of convenience. Ib. See in connection with this case, Brinkerhoff v. Brown, 6 J. C. R. 139.

To a demurrer for charging several and distinct matters against several defendants, a party demurring must join a denial of combination, although the bill charges it only formally. Roth v. Butler, Vernon & Scriven's (Irish) R. 85; Paul v. Forbes, Ib. 376. If a bill be liable to be dismissed for multifariousness, it ought to be dismissed in toto, and not be made the foundation of partial relief. Gibbs v. Clagett, supra.]

- (2) [Vice-Chancellor Shadwell, in Marcos v. Pebrer, 3 Sim. 466, said, he could not coincide with the decision in this case of Turner v. Robinson, (S. C. 6 Madd. 94;) as he could not see how, consistently with the rules of the court, the personal estate of A. could be joined in the same suit with the personal estate of B.; that there might be questions respecting the personal estate of B. with which the parties interested in the personal estate of A. were not at all concerned; and that, therefore, he did not think he was bound to adopt the principle of Turner v. Robinson.
 - (3) [Dunn v. Dunn, 2 Sim. 329; Wynne v. Callender, 1 Russ. 293, 297]
- (4) See the form of a demurrer for multifariousness, Willis, 464; Equity Draft. 422; Sim. & Stu. 79.

No rule can be laid down as to what constitutes multifariousness as an abstract proposition; each case must depend on its own circumstances and the court must exercise a sound discretion where the interests of the companies were so mixed up in all the transactions, that entire justice could scarcely be done, at least not conveniently done, without a union of the proprietors of both companies; and if they had not been joined the bill would have been open to the opposite objection, that all the proper parties were not before the court so as to enable it to make a final and conclusive decree touching all their interest several as well as joint, it was held that the bill was in no just sense multifa-

as the defendants may combine together to de-

rious. Thus, a party cannot in the same bill seek a divorce for extreme cruelty and adultery. The decree is very different in the two cases. In one case the parties are only separated, the other the marriage is dissolved and the parties at liberty to remarry. Defendant might be surprised by a bill framed with these two aspects and left in uncertainty as to what ground the complainant meant ultimately to rest on. The case in Saxton 474, shows that the Chancellor only tolerated a bill thus framed because no exception was taken, and the reasoning in 6 Johns. Ch. 163, is as applicable under the New-Jersey statute as under that of New-York, so blending with the application for decree a prayer for independent relief grounded on charges that require answer on oath is improper. The answer to a bill for divorce by New-Jersey statute cannot be under oath, while in all other cases it must. This on a bill framed as above would require two answers to one bill, one with and the other without oath. But in a bill for divorce a prayer for alimony may be inserted and any charges, made in it respecting property which might affect that question, would be proper. Decamp v. Decamp, 1 Green, 296-7, 294.

But to render the bill multifarious the matters must be not only separate and distinct, but each of a character entitling complainant to separate equitable relief. It is not multifarious if it set up one sufficient ground for relief and state another on which no relief can be had. Then defendant should demur to the defective part and answer the other, or object to the former on hearing. If a bill be multifarious it cannot be demurred to on that account, unless the prayer be also multifareous. Pleasants & Co. v. Glesscock et al., 1 Smedes & Marshall, Ch. R. Miss. 24, 17, on authority of Varick v. Smith, 5 Paige R. 137; Dick v. Dick, 1 Hogan, 290.

Where two give mortgages on their separate property to secure a joint note, blending the foreclosures, was held on demurrer, not multifarious, and that decree to foreclose both could be rendered. Wilcox et al. v. Mills et al., Id. 87, 85. The mortgages were made to secure the same debt and are but incident to the debt. Defendant could have compelled the union of the two, and complainant would not be permitted to coerce payment by two foreclosures when one would answer. Ibid. But if the objection was tenable it cannot be insisted on by the parties at the hearing. The objection of multifariousness cannot as a matter of right be taken by the parties except by demurrer, or plea, or answer, and if not so taken, it is deemed to be waived. But it may at any time be taken by the court sua sponte, whenever it is deemed by the court to be necessary or proper to assist it in the due administration of justice. Oliver et al. v. Piatt, 3 How. 411, 412, 333. Gaines

fraud the plaintiff of his rights, and such a combination is usually charged by a bill, it has been held that the defendant must so far answer the bill as to deny combination (b). In this however, the defendant must be cautious; for if the answer goes farther than merely to deny combination, it will overrule the demurrer (c) (1). A demurrer of this kind will hold only where the plaintiff claims several matters of different natures (2); but when

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nation, see sup. pp. 43, 44. The proit may apply to the usual general S. C. 1 Jac. 151. charge of combination, seems now to have been overruled. Brooks v.

(b) Powell v. Arderne, 1 Vern. Lord Whitworth, 1 Madd. R. 86; 416. As to the interpretation to be Salvidge v. Hyde, 5 Madd. 138. put upon this passage, see 8 Ves. 527; And the ultimate decision in the latand as to general charge of combi- ter case upon appeal, reversing the former, does not appear to have had position in the text, however, so far as any reference to that proposition;

(c) Hester v. Weston, 1 Vern. 463.

et ux. v. Chew et al., 2 Id. 619; McLean, assignee, v. Bank of Lafayette, 3 Mc Lean's R. 418, et seq. (where the authorities are reviewed,) 415. Interests wholly distinct and separate cannot be united. The reason is that individuals ought not to be subjected to expense and delay of investigating matters in which they have no common interest. That the pleading in chancery should rather conform to the simplicity of pleadings at law. But there is no absolute rule, as above mentioned. Mc Lean, &c. ib.

So a bill filed by the executors of an estate, and all those who purchased from them, is not upon that account alone, multifarious. Gaines v. Chew, 2 How. 619.

But where one sues as administrator and mixes up his own claim with that in his representative capacity, it is demurrable. Two bills would be necessary, Carter v. Treadwell, 3 Story Rep. 513.

So, if a joint claim, against two or more defendants is improperly joined in the same bill with a separate claim against one of those defendants only, in which the other defendants have no interest, and which is wholly unconnected with the claim against them, all or either of the defendants may demur to the whole bill for multifariousness. Swift v. Eckford, executor, &c., et al., 6 Paige R. 28, 22.

- (1) See note, page 248.
- (2) [Thus, an infant heir and only son of an intestate joined with

one general right is claimed by the bill, though the defendants have separate and distinct rights, a demurrer will not hold (d). As where a person claiming a general right to the sole fishery of a river, filed a bill against several persons claiming several rights in the fishery, as lords of manors, occupiers of lands, or otherwise (e). For in this case the plaintiff did not claim several separate and distinct rights, in opposition to several separate and distinct rights claimed by the defendants; but he claimed one general and entire right, though set in opposition to a variety of distinct rights claimed by the several defendants. So where a lord of a manor filed a bill against more than thirty tenants of the manor, freeholders, copyholders, and leaseholders, who owed rents to the lord, but had confused the boundaries of their several tenements. praying a commission to ascertain the boundaries: and it was objected at the hearing that the suit was improper, as it brought before the court many parties having distinct interests; it was answered, that the lord claimed one general right, for the assertion of which it was necessary to ascertain the several tenements, and a decree was made accordingly (f) (1).

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(d) See the cases cited above, pp. 169, 170. And see Buccle v. Atleo, 2 Vern. 37. As to cases of infringement of copyrights and patents, see Dilly v. Doig, 2 Ves. Jun. 486.

- (e) Mayor of York v. Pilkington, 1 Atk. 282.
- (f) Magdalen Coll. v. Athill and others, at the Rolls, 26 Nov. 1753. See the distinctions taken in Berke v. Harris, Hardres, 337.

his sisters in a bill against their mother, the administratrix, for an account of the intestate's real and personal estate: demurrer for multifariousness allowed. *Dunn* v. *Dunn*, 2 Sim. 329. Similar error, *Mand* v. *Acklom*, Ib. 331.] See note supra.

⁽¹⁾ Cases where a bill is multifarious.—It is not allowable to unite

As the court will not permit the plaintiff to de- splitt mand by one bill several matters of different natures

in the same information an application as to abuses in a school with Trusts both of a an application as to abuses in a college, though the latter are abuses school and a college. in relation to estates given to the college for the benefit of five scholars from the school; for the school and the college are distinct foundations, and one defence cannot be made as to the abuses in both. Attorney-General v. St. John's College, 7 Sim. 241.

Two or more distinct matters cannot be included in the same suit, Joining distinct where it does not clearly appear that they are homogeneous, with the information exception of minute differences, even in the case of a sole plaintiff against the same company. and a sole defendant. So that where an information, after stating a will by which property was given to a city company, for the purpose of making loans to young men free of the company, to assist them in trade and otherwise, alleges that divers other donations and bequests have been made to the company for the purpose of making loans to young men (generally and without restriction) for their advancement in business and life, and it prays relief in respect of the first-mentioned and such other gifts and bequests, it is multifarious. Attorney-General v. The Goldsmiths' Company, 5 Sim. 670.

If a person, who is the personal representative both of a testator Account both of and of the testator's residuary devisee and legatee, files a bill against al estate. an agent for an account of the rents of the real estate and of the personal estate, received by such agent since the testator's death, the bill is multifarious. Weeks v. Pitt, 10 Law J. (N. S.) Ch. Rep. 5.

real and person-

And so where the heir, who is also one of the next of kin, of an intestate, joins with the other next of kin in a bill against the administratrix, who has entered into possession of the real estate, as well as the personalty, for an account of the intestate's real and personal estates, the bill is demurrable for multifariousness. Dunn v. Dunn, 2 Sim. 329; see also Maud v. Aclom, ib. 331.

The union of an equitable ejectment bill against one person, and a Equitable ejectbill to redeem against another person, is multifarious. Plumbe v. ment and demption. Plumbe, 4 Y. & C. Eq. Ex. 345.

ment and re-

A bill for a discovery and a commission or commissions to examine witnesses in aid of the defence to two separate actions for two separate libels, is multifarious and demurrable. For if the same commission or commissions were to furnish the defence for both actions, the plaintiff at law would be delayed from proceeding in either of the actions until the defendants were prepared for their defence in both. Shackell v. Macaulay, 2 S. & S. 79.

Discovery and commission in aid of the defence to two actions for two li-

If a vendor files a bill against a purchaser for a specific performance of the purchase contract, and in the same bill prays that another defen-

Seeking, in a

against several defendants, so it will not permit a bill to be brought for part of a matter only; but

formance, a fulfilment also of another agreethird person to enable the vendor to perfect the title.

dant who has agreed with the vendor to execute a release, in order to perfect the title, may be decreed to execute such release, the bill is multifarious: for the purchaser ought not to be harassed with a distinct agreement between the vendor and a third person, although such agreement was designed to be subservient to the performance of the purchase contract. Reynolds v. Johnston, 7 Law J. (O. S.) Ch. Rep. 45.

Bill for an account and for avoiding sales.

A bill for an account of a testator's e-tate, and also to set aside sales made by the executor and trustee to himself and another person, is multifarious. Salvidge v. Hyde, Jac. 151.

Administration and redemption.

A bill both for the administration of general personal estate and for the redemption of a mortgage is multifarious. Pearse v. Hewitt, 7 Sim. 471.

Bill of revivor of a foreclosure a question as to a lien claimed

If to a foreclosure suit, a third person, who has some interest in the suit introducing equity of redemption, is made a party; and in a bill of revivor supplemental matter is introduced, with reference to a lien claimed by the by a mortgagor mortgagor on land in the mortgagee's possession which was allotted to the mortgagor in respect of the mortgaged premises, such a bill is multifarious as regards such third person. Lloyd v. Douglas, 4 Y. & C. Eq. Ex. 448.

Mixing up dis-

Where a bill is not sustainable as a bill of interpleader, and it mixes up distinct claims of different defendants, although connected with the same subject-matter, it is multifarious. Bignold v. Audland, 11 Sim. 24.

Suit in respect of debts due to different persons.

A bill praying for a declaration that a person to whose nominee two debts due to different creditors have been assigned may be declared a trustee of such debts for another party, and may be restrained from proceeding at law upon judgments obtained for them, is demurrable for multifariousness. Miller v. Walker, 9 Jur. 107.

Account of two agencies.

A bill for an account of agencies with two different firms, though carrying on the same concern, and only different by reason of a change of some of the partners, is multifarious, if the allegations of the bill are such, that, when taken most strongly against the plaintiff, they show that the dealings with the two firms were separate transactions. Benson v. Halfield, 5 Beav. 546.

Account of transactions be-Sween two per-sons mixed up with an account of transactions between them tive partners.

Where a person makes a shipment of goods on account of another, and advances money to him upon the goods, and afterwards the same person and his partner make other shipments of goods on account of such other party and his partner, and advance money to them upon and their respect those goods; and the proceeds of all the shipments are remitted to another firm; and the surviving partners of that firm file a bill of interpleader against the assignees of the person who made the first ship-

to prevent the splitting of causes, and consequent

ment, and his partner, and the assignees of the person on whose account the first shipment was made and his partner, and pay the balance of all the remittances into court, as one balance; and the assignees of the person who made the first shipment and his partner file a bill against the surviving partners of the firm to whom the remittances were made, and against the assignees of the person on whose account the first shipment was made and his partner, for an account of what is due to the person by whom the first shipment is made, and also of what is due to him and his partner, on account of their advances; the suit is multifarious; because the first transaction between two persons, when alone, ought not to be mixed up with the transactions between the same persons, after each had entered into partnership with another person. Miller v. Crawford, 9 Law J. (O. S.) Ch. R. 193, L. C.

Cases where a bill is not multifarious.—It does not follow, as a neces- Multifariousness sary consequence, that in every case in which a bill is multifarious as dant. to one defendant, it is multifarious as to the rest. Att. Gen. v. Cradock, 8 Sim. 457.

Where a case is an entire case as against one defendant, the court Where one dewill not attach weight to the objection that another defendant is connected only with some portion of the whole case: for, in order to obvice as against ate this objection, it would be necessary to split an entire case. And another defendhence where a bond is improperly given to a person by a corporation, and a rate is imposed to provide a fund to meet the demand upon the bond, an information seeking protection against both the bond and the rate is not multifarious: for as the illegality of the bond creates an illegality in the rate, there is an entire case as against the corporation; and though the obligee has nothing to do with the rate, but only with the bond, yet the information is not multifarious as to him. Att. Gen. v. Parr, 8 Cl. & Fin. 409.

Several charitable trusts, especially if the property is small, may be Comprising sevcomprised in one information, where one and the same party is pro- trusts in one in ceeded against (such as a city company,) and where the several trusts, though created by different persons, and at different times, have all a common subject-matter (such as monies given in trust to be lent,) and where the persons beneficially interested in the trusts belong to the same body, (as for instance, to the company proceeded against), although very different descriptions of persons among that body are respectively the objects of the respective charities. Att. Gen. v. Merchant Tailors' Company, 1 M. & K. 189.

formation.

Where an information is filed against the trustees of certain chari- Seeking the genties, and against a person who, in concert with one of the trustees, tion of a charity has effected an exchange of property in which they were jointly inter- in respect of a

multiplicity of suits, will allow a demurrer upon this ground (g).

(g) 1 Vern. 29; Edgworth v. See above, pp. 169, 170. [See the Swift, 4 Bro. P. C. 654, Toml. Ed. form of such a demurrer, Willis 466.

fraud as to a . part by one trus-tee and a third person.

ested for a portion of the charity estate, and such information alleges that such exchange is fraudulent, and that the charity estate has been improperly managed by the trustees, and prays a general account, and a scheme, and that the exchange may be set aside; a demurrer for multifariousness put in by the party who had colluded with the trustee in the exchange will be overruled. Att. Gen. v. Cradock, 3 My. & C. 85.

Account of both real and personal estate.

Where executors have possessed themselves of the rents and profits of real estate and personal estate devised and bequeathed to different parties, and have blended both together, so that they cannot be distinguished, a bill filed against the executors and the persons interested in the personal estate and the rents and profits of the real estate, for an account of both, is not demurrable for multifariousness or misjoin-Sanders v. Kelsey, 10 Jur. 833.

Administration of estates of two partners in one suit

The administration of the real and personal estates of two deceased partners, towards the payment of their joint and separate debts, may be comprised in one suit; for the rule is, that the joint estate must first be applied in payment of the joint debts, and then the surplus of the separate estate of each partner which may remain after payment of the separate debts of that partner is contributable to supply the deficiency of the joint estate to pay the joint debts. And those who are interested in the surplus of the separate estate of one partner, ought to be present to a suit instituted for the purpose of ascertaining what is the surplus of the separate estate of another partner. v. Douglas, 11 Sim. 283; Brown v. Weatherby, 12 Sim. 6.

Account of the estates of two deceased persons.

Where an action is brought by an administrator of an intestate against the executors of the widow of the intestate, who had possessed assets without having taken out administration, for monies alleged to be due to the intestate's estate; and the executors of the widow and the children of the intestate file a bill against his administrator, for an account both of the estate of the intestate and of the estate of the widow, and of what is due from the former estate to the latter, and for an injunction to restrain the action, the bill is not multifarious; for in such case the court cannot administer relief without taking the accounts of both estates. Lewis v. Edmund, 6 Sim. 251.

Bill by different bodies of underpolicies.

Where a policy of insurance is underwritten by Lloyd's underwriters, and another policy is effected by the same party with the corwriters in respect of distinct poration of the London Assurance, these bodies of underwriters may

A discovery being compelled upon a bill praying whether a de

Whether a derelief extends to the discovery.

join in one bill against the assured. Mills v. Campbell, 2 Y. & C. Eq. Ex. 391.

Where a bill is filed by the drawer and acceptor of four bi'ls of ex- Suit in respect change, against a person to whom they had been delivered for the exchange. purpose of being discounted, and against his indorsees, and against subsequent indorsees who are the holders of the bills, praying for a delivery up of the bills on the ground of a fraud to which all the defendents were privy, such a bill is not multifarious. Lord Foley v. Carlon, 1 Younge, 373.

If a bill is filed by two executors for an account of assets received Bill for a set off, by an agent, and for the performance of an agreement for a set-off of actions on pro such assets against monies lent by him to them individually on their missory notes o respective separate accounts, and for an injunction to restrain an action brought after notice of such agreement, by indorsees of promissory notes given by them for the monies so lent; the bill is not mu'tifarious, nor is there a misjoinder of plaintiffs. Davis v. Cripps, 2 Y. & C. Ch. Ca. 430.

and to restrain missory notes of

Where the executors of a testator refuse to file a bill to have a testator's estate recouped out of a fund in court, in respect of a debt paid estate recouped out of that estate, which ought to have been paid out of such fund, and and judgment there are no assets of the testator remaining for payment of a judgment sum recouped. creditor and of a mortgagee, whose mortgage debt has priority over the judgment debt; the judgment creditor may, without any objection on the ground of multifariousness, file a bill to have the testator's estate recouped, and the mortgage and judgment debts paid out of the sum as to which the estate of the testator is sought to be so recouped; and for that purpose the mortgagee and the party interested in the fund above mentioned, as well as the executors, are proper parties. Lancastor v. Evors, 4 Beav. 158.

Bill to have an and a mortrage

A bill to restrain commissioners under an act of parliament from paving one part and draining another part of the same plot of groun l, is not multifarious. Birley v. The Constable; &c. of Charlton-upon -Medlock, 3 Beav. 499.

Bill to restrain different acts of the same per-

Where by a deed executed before marriage, a husband vests a fund in two trustees, upon trust for his wife for life, and, after her decease, for the benefit of the chi'dren of the marriage, with a proviso that the persons to be appointed guardians by his will, with the trustees, shall, after the decease of his wife, have authority to apply the interest and part of the capital for the maintenance and advancement of the children; and by another deed, after marriage, he vests another fund in two other trustees, upon similar trusts, with a similar proviso; and by his will, after some specific bequests to his wife, he bequeaths his pro-

Bill in respect of deeds and a will.

relief, for the purpose of enabling the plaintiff to

perty to three of the trustees of the deeds, upon certain trusts for the benefit of his children, and appoints them executors and guardians of his infant children; and the wife and children file a bill against the four trustees for a performance of the trusts of the deeds, and for an account of the personal estate and debts, and an administration of the property; a demurrer by the three trustees appointed guardians, put in on the ground of multifariousness, will be overruled; for there is a common interest in all the plaintiffs under all the instruments; and all the defendants are accounting parties, though they are not all parties to all the instruments; and the three demurring defendants have all an interest, not only under the will, but also under the deeds, by force of the provisos therein contained. Campbell v. Mackay, 1 My. & C. 602.

Seeking relief against fraud, and also a general administration.

Where third parties have been implicated in what they know to be a misapplication of the funds of a joint-stock company, they may be made defendants to a bill by some of the shareholders of the company, although the bill, besides seeking relief against such third parties prays also for the general administration of the assets of the company. Lund v. Blanshard, 4 Hare, 9. In the case in which this point arose, the company was a banking company, and the third party was another banking company.

Payment of a debt and impeachment of a prior security of another creditor.

If a cestui que trust of a sum of money covenanted to be settled seeks payment thereof out of the assets of the covenantor, and for a general administration of his personal estate for that purpose, if assets be not admitted, and also seeks to impeach a prior security claimed over the whole of the covenantor's property by one of the trustees of the settlement; a demurrer by him for multifariousness in the usual form is bad, because all the matters may come into consideration in the course of taking the account, and therefore are not "distinct," and the defendant trustee is "interested" in the account as trustee. Addison v. Walker, 4 Y. & C. Eq. Ex. 442.

Distinct remedies against different defendants. A bill is not multifarious because it seeks to enforce one remedy against one defendant, and another remedy, in addition to that remedy, against another defendant. Manners v. Rowley, 10 Sim. 470.

Right mode of taking the objection of multifariousness.—In a case where defendant demurred to a bill for multifariousness, and it was then amended so as to preclude a demurrer on that ground, but he insisted on the same objection in his answer to the amended bill, Sir J. Wigram, V. C. said, "It would certainly be most unjust if a plaintiff could compel a defendant to continue a party to a multifarious record, merely by inserting false allegations in the bill. A plea that a bill is multifarious is a defence I have never seen, though I know such a plea

obtain that relief, the discovery is in general incidental to the relief (h), and a demurrer to the relief consequently extends to the discovery likewise (i) (1).

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- (h) 1 Sim. & Stu. 93.
- 544; 3 Meriv. 502. It may happen, overruled. See Brandon v. Sands, however, that the relief sought may 2 Ves. Jun. 514; Brandon v. Johnson, be consequential to discovery to which ib. 517.

the plaintiff is entitled, in which case (i) See Baker v. Mellish 10 Ves. a general demurrer would perhaps be

has, whether successfully or not, been attempted. . . . In what form this objection may be successfully taken or resisted, according to the strict mode of pleading, I need not now inquire." But the learned judge added, "The objection of multifariousness is one which should be taken in limine. . . . The defendant may be subjected to the expense of taking copies of papers relating to matters with which he has no concern, and be kept before the court on the discussion of points in which he is not interested. If the defendant does not take the objection in limine, the court, considering the mischief as already incurred, does not, except in a special case, allow it to prevail at the hearing. All that the court, in this case, can do, is to protect the defendant from the costs incurred, if it should hereafter appear he has been improperly subjected to costs." Benson v. Hadfield, 4 Hare, 39, 40.

(1) A demurrer to the specific relief prayed will not extend to the discovery sought, where the bill states a clear case for other relief, does not extend which can be given under the prayer for general relief, and to which to discovery. the discovery sought may be ancillary. Deare v. Attorney General, 1 Y. & C. Eq. Ex. 197.

If a bill solely maintainable for discovery, prays relief, it would in England, but not in America, be open to demurrer to the whole bill. The rule in England was formerly, that if a bill for discovery and relief was good for discovery only, a general demurrer to the whole was bad, for though the party was not entitled to relief, he was not to be prejudiced for asking too much. Story Eq. Pl. § 312, and note 2, citing Mitf. 183-4 and other authorities. The proper course in New-York, is held to be to demur to relief and answer to discovery. Brownell v. Curtis, 10 Paige 210; Higginbotham v. Burnet, 5 Johns C. R. 184; so in Supreme Court U.S., Livingston v. Story, 9 Peters R. 632, 658; Whitbeck v. Edgar, 2 Barb. Ch. R. 106.

Defendant may answer and make discovery sought by a bill for discovery and relief, and demur as to the relief only. In cases where complainant is entitled to the relief, but not to the discovery of the facts upon which the claim to relief depends, because the discovery might criminate defendant to subject him to a forfeiture, or would be a breach But as the court entertains a jurisdiction in certain cases for the mere purpose of compelling a discovery, without administering any relief, it was formerly conceived that though a plaintiff prayed by his bill relief to which he was not entitled, he might yet show a title to a discovery; and therefore, though a demurrer might hold to the relief, the defendant might notwithstanding be compellable to answer to the discovery, the bill being then considered as in effect a bill for a discovery merely (k). This, however, has since been determined otherwise (1); and where a plaintiff entitled to a discovery added to his bill a prayer for relief (m), a demurrer has been

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- (k) See Fry v. Penn, 2 Bro. C. C. against the interference of the court, 280 (1).
- C. 319.
- to the defendant being thus able by demurrer wholly to protect himself

it must appear from the manner in (1) See Price v. James, 2 Bro. C. which the plaintiff states his case that he seeks the discovery as inci-(m) It is presumed, that in order dental to the relief. See cases in the next note.

of confidence which some principle of public policy will not permit, defendant may answer as to the relief and demur as to the discovery. But where the same principle upon which the demurrer to the discovery of the truth of the allegations contained in the bill is attempted to be sustained, is equally applicable as a defence to the relief sought by the bill, the defendant cannot demur to the discovery only and answer as to the relief. Brownell v. Curtis et. al., 10 Paige R. 210.

Where the bill seeks relief which the court has no power to grant, as for redemption of land sold for taxes, and also a discovery as to the facts connected with the sale, and as to an evasion of a tender, so as to prevent redemption within two years, a demurrer to the whole may not be too broad, there being no averment that any suit at law was pending or about to be brought, in which a discovery may be material, the demurrer is proper for that cause. The bill was dismissed without prejudice to an action at law. Mitchell et al. v. Green et al., 10 Metcalf R. Mass. 101, 108.

(1) [Also Higginbotham v. Burnet, 5 J. C. R. 184; Laight v. Morgan, 1 J. C. 429; S. C. 2 C. C. E. 344.]

allowed (n). And where a defendant had demur- Demurrer to the discovery and red to the discovery sought by a bill, for want of not to the relief. title in the plaintiff to require the discovery, but had omitted to demur to relief prayed (1), to which that discovery was merely incidental, it was conceived the demurrer must, in point of form, be overruled; for the demurrer, applying to the discovery only, admitted the title to relief, and consequently admitted the title to the discovery, which was only incidental to the relief (o). But though a plaintiff may be entitled to the relief he prays, there may yet be reasons to induce a court of equity to forbear compelling a discovery (p).

It remains therefore to consider the objections to Grounds of dea bill which are causes of demurrer to discovery.

(n) Collis v. Swayne, 4 Bro. C. C. 480; Loker v. Rolle, 3 Ves. 4; Ryves v. Ryves, 3 Ves. 343; 6 Ves. 63; 6 Ves. 686; 8 Ves. 3; Gordon v. Simpkinson, 11 Ves. 509; 17 Ves. 216; 1 Ves. & Bea. 539; 2 Ves. & Bea. 328; Jones v. Jones, 3 Meriv. 161; 3 Meriv. 502. This may probably have the effect of compelling a plaintiff in a doubtful case to frame his bill for a discovery only in the first instance; and, having obtained it, by amending his bill to try the question whether he is also entitled to relief; which was formerly a frequent prac-

tice, and possibly a greater inconvenience (2).

- (o) Morgan v. Harris, in Ch. 31 Oct. 1786, reported 2 Bro. C. C. 121; Waring v. Mackreth, Forrest, 129.
- (p) A plaintiff may be entitled to relief in equity, independently of the discovery, 1 Swanst. 294. And there may be instances in which a defendant, although he should think proper to give the discovery, may yet demur to the relief. 2 Atk. 157; Hodgkin v. Longden, 8 Ves. 2; Todd v. Gee, 17 Ves. 273.

⁽¹⁾ The 36th order of August, 1841, does not enable a defendant to demur to discovery without demurring to the relief. Dell v. Hale, 2 Y. & C. Ch. C. 1.

^{(2) [}And see Butterworth v. Bailey, 15 Ves. 361; Crow v. Tyrell, 2 Mad. C. R. 409; Lousada v. Templer, 2 Russ. 561; M'Dongall v. Miln, 2 Paige's C. R. 325; also page 201, post; Allen v. Copeland, 7 Price's R. 522; Melish v. Richardson, 11 Price, 530; Jackson v. Strong, 13 Price, 494.]

only. These are, I. That the case made by the bill is not such in which a court of equity assumes a jurisdiction to compel a discovery: II. That the plaintiff has no interest in the subject, or no interest which entitles him to call on the defendant for a discovery: III. That the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him even for the purpose of discovery: IV. Although both plaintiff and defendant may have an interest in the subject, yet that there is not that privity of title between them which gives the plaintiff a right to the discovery required by his bill: V. That the discovery if obtained cannot be material: and, VI. That the situation of the defendant renders it improper for a court of equity to compel a discovery (1).

I. Want of jurisdiction.

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I. Where a bill prays relief, the discovery, if material to the relief, being incidental to it, a plaintiff showing a title to relief also shows a case in which a court of equity will compel a discovery, unless some circumstance in the situation of the defendant renders it improper. But where the bill is a bill of discovery merely, it is necessary for the plaintiff to show by his bill a case in which a court of equity will assume a jurisdiction for the mere purpose of compelling a discovery. This jurisdic-

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Demurrer on the ground that the discovery relates to the defendant's title.

On the subject of discovery, the reader is referred to the learned works of Sir James Wigram and Mr. Hare.

⁽¹⁾ To a bill by legatees, whose legacies are charged on real estate, charging that the testator was tenant in fee simple, and not tenant in tail, of such real estate, as alleged by the defendant, or that only a small portion thereof was entailed, and seek ng for a discovery and production of the deed of entail, a demurrer on the ground that it relates to the defendant's title will be allowed. Wilson v. Forster, 1 Younge, 281.

tion is exercised to assist the administration of justice in the prosecution or defence of some other suit, either in the court itself or in some other court(q). Where the object of a bill is to obtain a discovery to aid the prosecution or defence of a suit in the court itself, as the court has already jurisdiction of the subject, to state the suit depending is sufficient to give the court jurisdiction upon the bill of discovery (2). But if a bill is brought to aid, by

(q) See Moodaly v. Moreton, Dick. A discovery has been compelled to 652; S. C. 1 Bro. C. C. 469; Bishop aid the jurisdiction of a foreign court. of London v. Fytche, 1 Bro. C. C. 96; Crowe and others v. Del Ris and Val-Cardale v. Watkins, 5 Madd. 18. lego, in Chan. 11th July, 1769 (1).

In Bent v. Young, 9 Sim. 191, 192, Sir L. Shadwell, V. C., observed, that the demurrer in this case was a speaking demurrer; and that the Lord Chancellor may very probably have overruled the demurrer on that ground, without at all entering into the consideration of the question, whether the court will enforce discovery in aid of proceedings in a foreign court.

The authorities, says Story, are contradictory as to a bill in aid of prosecution or defence of a foreign suit. In Bent v. Young, 9 Sim. R. 180, the V. C. held it would not be in aid of a defence, and that Crowe v. Del Ris, cited in Mitford, 186, n. (q), do not support the doctrine. But in Mitchell v. Smith, 1 Paige's C. R. 287, it was held that such bill would lie. Story's Eq. Pl. § 311.

A foreign judgment cannot be questioned in the courts in this county. Therefore, a bill for a discovery and commission to examine witnesses abroad, in aid of the complainant's defence to an action brought in this country on a foreign judgment, is demurrable. Martin v. Nicols, 3

(2) It ought to state enough to enable the court to see that the ends of justice require its interposition; and the facts sought to be dis-

^{(1) [}See the form of such a bill, Willis, 316. It is well established, that whether the action, in aid of which a discovery is sought, be founded on contract or in tort, if the plaintiff has an equitable right, a discovery will be enforced. Skinner v. Judson, 6 Day N. S. 528, and cases there referred to; Northrop v. Hatch, 6 Conn. R. 361. After a verdict at law, the party comes too late with a bill for discovery. Duncan v. Lyon, 351.]

a discovery, the prosecution or defence of any proceeding not merely civil in any other court, as an indictment or information, a court of equity will not exercise its jurisdiction to compel a discovery, and the defendant may demur (r). And in the case of suits merely civil in a court of ordinary jurisdiction, if that court can itself compel the discovery required, a court of equity will not interfere (s). Therefore, where a bill was filed for a discovery of the value of the respective real and personal estates

(r) 2 Ves. 398; and see Thorpe v. (s) 1 Atk. 288; 1 Ves. 205; Anon. Macauley, 5 Madd. 218; Shackell 2 Ves. 451. v. Macauley, 2 Sim. & Stu. 79 (1).

covered should be so far stated as to show their pertinency and relevancy. M'Intyre v. Mancius, 3 J. C. R. 45; S. C. on appeal, 16 J. R. 592; and see Askam v. Thompson, 4 Price, 330. If the facts depend on the testimony of witnesses, and the court of law can compel their attendance, chancery will not interefere. Gelston v. Hoyt, 1 J. C. R. 543; and see Seymour v. Seymour, 4 lb. 409. A bill of discovery must be for matters which lie only within the defendant's knowledge. Bullock v. Boyd, 2 Marsh. 323. A bill of discovery will be sustained to aid the prosecution or defence of a civil suit in a foreign tribunal, Mitchell v. Smith, 1 Paige's C. R. 287. Vance v. Andrews, 2 Barb. Ch. Rep. 370. [And see pages 200, 201, post.] There is no limitation, in point of time, within which a bill for discovery in aid of an action at law must be filed. Munt v. Scott, 3 Price, 477.

Chancellor Walworth, in the case of *Dias* v. *Merle*, 4 Paige C. R. 259, recognises another species of discovery-bill where no relief is prayed: namely, a bill of discovery in aid of the original (chancery) suit. See an extract from his opinion at page 62, ante, in note.]

(1) [Patterson v. Patterson, 1 Hayward's R. 167; M'Intyre v. Mancius, on appeal, 16 J. R. 276; Skinner v. Judson, 8 Day, 528. But it is said, that if the forfeiture or penalty is waived by those who are entitled to it, or is barred by the statute of limitations, it no longer shields the party from a discovery. Skinner v. Judson, supra. See the form of a demurrer where a discovery would subject the defendant to pains and penalties and forfeitures. Willis, 477; and observe note (a) there. Also page 194, post.]

of the inhabitants of a parish in which a church rate had been assessed, and of the application of the money collected, a demurrer was allowed; because the ecclesiastical court, to which the ordinary jurisdiction belonged, was capable of compelling the discovery (t).

II. A bill must show an interest in the plaintiff

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in the subject to which the required discovery relates (u), and such an interest as entitles him to call the defendant for a discovery. on the defendant for the discovery. Therefore where a plaintiff filed a bill for a discovery merely, to support an action which he alleged by his bill he intended to commence in a court of common law, although by this allegation he brought his case within the jurisdiction of a court of equity to compel a discovery, yet the court being of opinion that the case stated by the bill was not such as would support an action, a demurrer was allowed (x); for unless the plaintiff had a title to recover in an action at law, supposing his case to be true, he had no title to the assistance of a court of equity to obtain from the confession of the defendant evidence of the truth of the case (y). And upon a bill filed by a creditor, alleging that he had obtained judgment against

his debtor, and that the defendant, to deprive him of the benefit of his judgment, had got into his hands goods of the debtor under pretence of a debt due

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(t) Dunn v. Coates, 1 Atk. 288.

⁽u) Ramere v. Rawlins, Rep. Temp. Finch 36; Newman v. Holder, ib. 44; and see 2 Ves. 247; Northleigh v. Luscombe, Ambl. 612; and Wright v. Plumtree, 3 Madd. 481.

⁽x) Debbieg and Lord Howe, in Chan. Hil. 1782; cited 3 Bro. C. C. 155; Wallis v Duke of Portland, 3 Ves. 494; Lord Kensington v. Mansell, 13 Ves. jun. 240.

⁽y) See The Mayor of London v. Levy, 8 Ves. 398.

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to himself, and praying a discovery of the goods; the defendant demurred, because the plaintiff had not alleged that he had sued out execution, and because until he had so done the goods were not bound by the judgment, and consequently the plaintiff had no title to the discovery; and the demurrer was allowed (y).

III. Want of interest in the defendant.

III. Unless a defendant has some interest in the subject, he may be examined as a witness, and therefore cannot in general be compelled to answer a bill for a discovery (z) (1); for such a bill can only be to gain evidence, and the answer of the defendant cannot be read against any other person, not even against another defendant to the same bill (a) (2). But if the bill states that the defendant has or claims an interest, a demurrer, which admits the bill to be true, of course will not hold (b), though the defendant has no interest; and he can then only avoid answering the bill by plea or dis-There seems to be an exception to the

But see Taylor v. Hill, 1 Eq. Ca. ton v. Hughes, 7 Ves. 287; 14 Ves. Ab. 132.

(z) Steward v. E. I. Comp. 2 Vern. 380; Dineley v. Dineley, 2 Atk. 394; Plummer v. May, 1 Ves.

(y) Angell v. Draper, 1 Vern. 399. 426; 1 Ves. Jun. 294, note (e). Fen-252; How v. Best, 5 Madd. 19.

> (a) 2 Vern. 380; 3 P. Wms. 311, and ib. note (h).

(b) 1 Ves. 426.

[See the form of such a demurrer, Willis, 470.]

[Hampton v. Hampton, Vern. & Scriv. 514; Crane v. Deming, 7 Day's R. 387.]

⁽¹⁾ Jones v. Maund, 3 Y. & C. Eq. Ex. 347. Payne v. Cowan et al. 1 Smedes & Marsh. C. R. Miss. 27.

^{(2) [}And if a bill be filed against two, and one has no interest, a demurrer will hold. Thus, a bill was filed against husband and wife showing an interest in the husband, but none in the wife. Both joined in a general demorrer; and it was sustained as to her. Crane v. Deming, supra. See a demurrer to a bill where the defendant could be examined as a witness, Willis, 472.] Wooden v. Morris, 2 Green's C. R. 65.

rule in the case of a corporation; for as a corporation can answer no otherwise than under their common seal, and therefore, though they answer falsely, there is no remedy against them for perjury, it has been usual, where a discovery of entries in the books of the corporation, or of any act done by the corporation, has been necessary to make their secretary or book-keeper or other officer a party (c); and a demurrer because the bill showed no claim of interest in the defendant has been in such case overruled (d). So where bills have been filed to impeach deeds on the ground of fraud, attornies who have prepared the deeds, and other persons concerned in obtaining them, have been frequently made defendants, as parties to the fraud complained of, for the purpose of obtaining a full discovery; and no case appears in the books of a demurrer by such a party because he had no claim of interest in the matter in question by the bill. Indeed an attorney under such circumstances, being brought as a party to the suit to a hearing, has been ordered to pay costs (e); apparently on the same ground as costs were awarded againt arbitrators in the cases of their misconduct before noticed (f).

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5 Pri. Ex. R. 491.

⁽c) Anon. 1 Vern. 117 (1).

⁽e) Bennet v. Vade, 2 Atk. 324;

⁷ Ves. Jun. 289; 14 Ves. 252, et seq.; Gibbons v. Waterloo Bridge Comp.

⁽d) Wych v. Meal, 3 P. Wms. 310; 1 Sch. & Lefr. 227; Fenwick v. Reed, 1 Meriv. 11.

⁽f) Vid. sup. p. 187.

^{(1) [}And see Vermilyea v. The Fulton Bank, 1 Paige's C. R. 37; President, &c. of Fulton Bank v. Sharon Canal Co., Ib. 219; 2 Revised Statutes of N. Y. 465, § 52; also p. 103, note, ante.]

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IV. Want of privity between the plaintiff and defendant.

IV. Although both plaintiff and defendant may have an interest in the subject to which the discovery required is supposed to relate, yet there may not be that privity of title between them which can give the plaintiff a right to the discovery. Thus where a bill was filed by a person claiming to be lord of a manor against another person, also claiming to be lord of the same manor, and praying, amongst other things, a discovery in what manner the defendant derived title to the manor, the defendant demurred, because the plaintiff had shown no right to the discovery, and the demurrer was allowed (g).

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So where a bill was filed by a person claiming under a grant from the duchy of Lancaster, to be bailiff of a liberty within the duchy, with a right to all waifs, estrays, and other casualties within the liberty, and all fees and perquisities respecting the same, against the owner of an inn in the liberty, and his tenants, alleging that the inn-yard had been used as a common pound within the liberty for all waifs and strays and casualties: and that the tenant, under demise from the owner, had seized and taken all waifs and strays and other casualties; and received the fees and perquisites thereon; and required the owner to discover how he derived title thereto, and what leases or demises he had made thereof; a demurrer to the discovery was allowed (h).

Chan. Hil. 1779.

⁽h) Ritson v. Sir, John Danvers, in Duchy C. of Lancaster, 28 Oct.

⁽g) Adderley and Sparrow, in Adderley, Hungerford v. Goreing, 2 Vern. 38; Stapleton v. Sherrard, 1 Vern. 212; Sherbone v. Clerk, 1 Vern. 273, and Welby and D. of Rut-1787, by the Chanceller, assisted by land, 2 Brown P. C. 39, Toml. Ed. Lord Loughborough and Mr. Justice were cited; and Lord Loughborough Wilson. The cases of Sparrow v. mentioned a case of Sir William

In general, where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims (i). And therefore, on a bill filed by an heir ex parte materna against a general devisee and executor, who had completed by conveyance to himself a purchase of a real estate contracted for by the testator after the date of his will, alleging that there was no heir ex parte paterna, but that the devisee set up a title under a release from his father as heir ex parte paterna of the testator, and praying a conveyance to the plaintiff, and seeking a discovery in what manner the father claimed to be heir ex parte paterna, and the particulars of the pedigree under which he claimed, a demurrer to that discovery was allowed (k).

V. As the object of the court in compelling a dis- v. Immateriality of the discocovery is either to enable itself or some other court to decide on matters in dispute between the parties, the discovery sought must be material, either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted (1).

Wake and Conyers before Lord J. and Thomson, B. assisting. Northington. See also Corporation of Dartmouth v. Seale in Chan. 18 Dec. 1717, rep. 1 Cox, R. 416. See also Ritson v. Sir John Danvers, 24 Nov. 1790, on demurrer to an amended bill, Baron Thomson assisting the Chancellor; and Att. Gen. v. Sir John Danvers, 25 Jan. 1792; Grose,

(i) Stroud v. Deacon, 1 Ves. 37; Buden v. Dore, 2 Ves. 445; Sampson v. Swettenham, 5 Madd. 16; Tyler v. Drayton, 2 Sim. & Stu. 309, and the cases therein cited; and see Chamberlain v. Knapp, 1 Atk. 52.

(k) Ivy v. Kekewich, in Ch. 27th July, 1795, rep. 2 Ves. Jun. 679.

⁽¹⁾ A bill may be sustained for a discovery in aid of an action at Bill of discovery law, and for an injunction to restrain the defendants at law in the in support of an mean time "from proceeding to apply for judgment as in the case of

If therefore the plaintiff does not show by his bill such a case as renders the discovery which he seeks material to the relief, if he prays relief or does not

deem sought a discovery, whether the mortgagee was a trustee, a demurrer to the discovery was al-

lowed. For as there was no trust declared upon the mortgage, it was not material to the relief prayed whether there was any trust reposed in the de-

show a title to sue the defendant in some other court (1), or that he is actually involved in litigation with the defendant, or liable to be so, and does not [192] also show that the discovery which he prays is material to enable him to support or defend a suit, he shows no title to the discovery, and consequently a demurrer will hold (m) (1). Therefore where a bill filed by a mortgagor against a mortgagee to re-

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(1) Debbieg and Lord Howe, in Ch. Hil. 1782; cited 3 Bro. C. C. 155; Wallis v. Duke of Portland, 3 Ves. 494; The Mayor of London v. Levy, 8 Ves. 398; Lord Kensington v.

Mansell, 13 Ves. Jun. 240.

(m) Sèe cases cited supra, note (l); and see 1 Ves. 249; 1 Bro. C. C. 97; and Askam v. Thompson, 4 Pri. Exch. R. 330; Cardale v. Watkins, 5 Madd. 19.

nonsuit, or from taking the cause to trial by proviso," although it is not clear that the action can be maintained, but yet there is considerable ground for argument in support of the action in a court of law. Thomas v. Tyler, 3 Y. & C. Eq. Ex. 255. A colonial or foreign judgment cannot be questioned in the courts of

Bill for a discovery and com-mission in aid of

Bill for a commission to exa-

this country: and therefore a bill for a discovery and a commission, a defence to an to examine witnesses abroad, in aid of the plaintiff's defence to an action on a tor-eign judgment, action brought in this country on a colonial or foreign judgment, is demurrable. Martin v. Nichols, 3 Sim. 458.

(1) Where a bill is filed for a commission to examine witnesses, mine witnesses, and for a discovery in aid of a defence at law to an action for libel, it very in aid of a is necessary that the case sought to be made out in equity should con-

defence to an activities for libel.
Reference to pleadings at law.

"as by the said pleas, reference being thereunto had, will appear:"

"as by the said pleas, reference being thereunto had, will appear:"

"as by the said pleas, reference being thereunto had, will appear:" lay v. Shackell, 1 Bligh, 96, (N. S.)

fendant or not (n). So where a bill was filed by a lord of a borough, praying amongst other things, a discovery, whether a person applying to be admitted tenant was a trustee, the defendant demurred (o), it being wholly immaterial to the plaintiff's case whether the defendant was a trustee or not. And where a bill was brought for a real estate, and sought discovery of proceedings in the ecclesiastical court upon a grant of administration, the defendant demurred to that discovery, the proceedings in the ecclesiastical court being immaterial to the plaintiff's case (p). Again, where a bill, to establish an agreement for a separate maintenance for the defendant's wife prayed a discovery of ill treatment of the wife, to make her recede from the agreement, the defendant demurred to the discovery (q) which could not be material to the case made by the bill. But in general, if it can be supposed that the discovery may in any way be material to the plaintiff in the support or defence of any suit, the defendant will be compelled to make it (r)(1). Thus where a bishop filed a bill against the

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⁽n) Harvey v. Morris, Rep. Tem. Finch, 214.

⁽o) Lord Montague v. Dudman, (r) 1 Ves. 205; and see Richards 2 Ves. 396. v. Jackson, 18 Ves. 472; 1 Madd.

⁽p) 2 Atk. 388. (2)

⁽q) Hincks v. Nelthrope, 1 Vern. 204.

⁽r) 1 Ves. 205; and see Richards v. Jackson, 18 Ves. 472; 1 Madd. R. 192; Att. Gen. v. Berkeley, 2 Jac. & W. 291.

⁽¹⁾ The Court of Chancery compels a discovery in aid of the prosecution of a suit at law, upon the same principle, and to the same extent that it compels a discovery in aid of the defence of a suit. Lane v. Stebbins, 9 Paige, Ch. R. 622. As a general rule, the complainant, who is sued at law and has a legal defence to such suit, and who only needs the aid of the Court of Chancery to obtain a discovery to enable him to establish such defence, must come into the Court of Chancery, for his discovery before the trial at law. Paterson v. Bangs, 9 Paige, Ch. R. 627.

^{(2) [}And see the form of such a demurrer, Willis, 475.]

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patron of a living and a clerk presented by him, to discover whether the clerk had given a bond of resignation, and the patron demurred, because the discovery either was such as might subject him to penalties and forfeitures, or it was immaterial to the plaintiff, the demurrer was overruled; the court declaring a clear opinion that the bond was not simoniacal, but conceiving that the discovery might be material to support a defence to a quare impedit, upon this ground, "that the bond put the clerk under the power of the patron, in derogation of the rights of the ordinary (s)."

VI. Tendency of the discovery to subject the defendant to punishment, penalties, forfeiture, or hazard of title.

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VI. The situation of a defendant may render it improper for a court of equity to compel a discovery, either because the discovery may subject the defendant to pains or penalties, or to some forfeiture; or something in the nature of a forfeiture; or it may hazard his title in a case where in conscience he has at least an equal right with the person requiring the discovery, though that right may not be clothed with a perfect legal title (t) (1).

(s) Bishop of London v. Ffytche, in Chan. Trin. 1781. In consequence of this decision an answer was put in admitting the bond; and a quare impedit being brought, it was finally determined in the house of lords against the patron, and he consequently lost his presentation. Perhaps, therefore, the overruling the demurrer was in contradiction to the principles on which courts of

equity have proceeded in the cases considered under the next head. See the cases reported in 1 Bro. C. C. 96, and Cunningham's Law of Simony. See also Grey v. Hesketh, Ambl. 268.

(t) See Ivy v. Kekewich, 2 Ves. Jun. 679; Lord Shaftesbury v. Arrowsmith, 4 Ves. 66; 13 Ves. 251; 15 Ves. 378; Wright v. Plumtree, 3 Madd. 481; Glegg v. Legh, 4 Madd. 193.

⁽¹⁾ A defendant is not bound to answer or disclose any facts showing that he has been guilty of any act for which he is liable to an indictment, or which can subject him to a penalty or forfeiture. Taylor v. Bruen, 2 Barb. Ch. R. 301.

S. II. P. I.]

DEMURRERS.

It is a general rule, that no one is bound to answer so as to subject himself to punishment, in whatever manner that punishment may arise, or whatever may be the nature of the punishment (u). If therefore a bill requires an answer which may (x)subject the defendant to any pains or penalties, he may demur to so much of the bill (y). As if a bill charges any thing which, if confessed by the answer, would subject the defendant to any criminal prosecution (z) (2), or to any particular penalties, as

(u) 2 Ves. 245, and the authorities garded as any admission of the truth referred to in note. . 1 Eq. Ca. Ab. of the charge; 16 Ves. 69. 131; 11 Ves. 525; 2 Swanst. 214.

(x) 1 Atk. 539; 1 Swanst. 305.

R. 230 (1). And it may be observed, 8 Ves. 405; 14 Ves. 65. that such a demurrer will not be re-

(z) East India Company v. Campbel, 1 Ves. 246; Chetwynd v. Lin-(y) See Billing v. Flight, 1 Madd. don, 2 Ves. 451; Cartwright v. Green,

^{(1) [}Patterson v. Patterson, 1 Hayward's (North Carolina) R. 167; Fleming v. St. John, 2 Sim. 181; Wolf'v. Wolf's executor, 2 Harris & Gill, 382; Livingston v. Tompkins, 4 J. C. R. 415; Lambert v. People, 9 Cowen, 578; Northrop v. Hatch, 6 Day's R. 361; Leggett v. Postley, 2 Paige's C. R. 599. But the Revised Statutes of the State of New-York, and a statute since passed, have provisions which compel a defendant to make a discovery in many cases where criminal prosecution and penalties can take place and be exacted. Thus, a defendant must answer to a gaming transaction at the suit of the loser or any other person. 1 R. S. 664, § 19. As to moneys illegally received for brokerage. Ib. 709, § 4. As to moneys and things taken usuriously. Ib. 772, 6. And, also, in all cases where the defendant is charged with being a party to a fraudulent conveyance. Laws of 1833, p. 17. See the form of a demurrer where a discovery would subject the defendant to pains, penalties and forfeitures, Willis, 477. And see page 186, ante.

⁽²⁾ A bill of discovery is demurrable where the whole object of it is to obtain a discovery of an illegal assault and imprisonment, with the view of subjecting the defendant to penal consequences. Glynn v. Houston, 1 Keen, 329. And it would seem that a bill of discovery cannot be sustained in aid of an action for a mere personal tort. Ib. 337.

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an usurious contract (a), maintenance (b), champerty (c), simony (d). And in such cases, if the defendant is not obliged to answer the facts, he need not answer the circumstances, though they have not such an immediate tendency to criminate (e) (1).

If the plaintiff is alone entitled to the penalties, and expressly waives them by his bill, the defend-

(a) Fenton v. Blomer, Tothill, 135; Wms. 375; Wallis v. Duke of Port-Earl of Suffolk v. Green, 1 Atkyns, 450; 2 Atk. 393; 22 Vin. Ab. Usury. Q. 4; Whitmore v. Francis, 8 Pri. Ex. R. 616.

(b) Penrice v. Parker, Rep. Temp. Finch. 75; Sharp v. Carter, 3 P. land, 3 Ves. 494.

(c) See 2 Sim. & Stu. 252.

(d) Att. Gen. v. Sudell, Prec. in Ch. 214; 1 Meriv. 401. But see p. 229, note (s).

(e) 1 Ves. 247, 248; 19 Ves. 227, 228.

The court will not compel a defendant to answer allegations, where there is a reasonable probability that by so doing he would subject himself to an indictment for a fraud. Maccallum v. Turton, 2 Y. & J. 183.

Where a bill seeks a discovery of transactions which would subject the defendant to a criminal prosecution under a statute, the defendant need not plead the statute, but may demur to the bill. Fleming v. St. John, 2 Sim. 181.

(1) [In a demorrer on this ground, it is necessary to state in it the why and wherefore a forfeiture would be the consequence of the discovery. Sharp v. Sharp, 3 J. C. R. 407; and see Le Roy v. Vedder, on appeal, 1 J. R. 417; Le Roy v. Servis, 1 C. C. E. 1; S. C. 2 Ib. 175; Wolf v. Wolf's executor, 2 Harris & Gill, 382. In Talbot v. Smith, Ridg. Lap. 2 Scho. (Irish) R. 306, a defendant demurred to a bill seeking discovery which would have made him liable to a penalty under the statute of usury. But it appearing that the statute of limitations had barred the penal action, it was held that there was no ground for a demurrer. The contrary appears to have been held in Connecticut. See the case of Northrop v. Hatch, 6 Day's R. 361; also Lambert v. The People, 9 Cowen's R. 578. See as to officers of a corporation objecting to answer on the ground that it may subject the company to a forfeiture of its charter. Robinson v. Smith, 3 Paige's C. R. 222.]

ant shall be compelled to make the discovery; for it can no longer subject him to a penalty (e). if a rector, or impropriator or vicar files a bill for tithes, he may waive the penalty of the treble value (f) to which he is entitled by the statute of 2 & 3 Edward VI., and thus become entitled to a discovery of the tithes subtracted. And though a discovery may subject a defendant to penalties to which the plaintiff is not entitled, and which he consequently cannot waive, yet if the defendant has expressly covenanted not to plead or demur to the. discovery sought, which is the common case with respect to servants of the East India company, he shall be compelled to answer (g) (1). Where, too, a person by his own agreement subjects himself to a payment in the nature of a penalty if he does a particular act, a demurrer to discovery of that act will not hold (h). Thus where a lessee

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And a person who has not been admitted a broker or agent, but acts as one, must answer, although he may thereby subject himself to a penalty for acting without having been admitted. Green v. Weaver, 1 Sim. 404.

Ves. 56; and see 1 Vern. 129; Bul- v. Douglas, 16 Ves. 239. lock v. Richardson, 11 Ves. 373.

⁽f) Anon. 1 Vern. 60.

⁽g) South Sea Comp. v. Bumsted, Vos. 173. 1 Eq. Ca. Ab. 77; E. I. Comp. v.

⁽e) Lord Uxbridge v. Staveland, 1 Atkins, 2 Ves. 108; and see Paxton

⁽h) See Morse v. Buckworth, 2 Vern. 443; E. I. Comp. v. Neave, 5

⁽¹⁾ A person who has been duly admitted a broker or agent by the mayor and aldermen of the city of London, must answer a bill of discovery in aid of an action for misconduct, brought against him by his employer, although the discovery will subject him to penalties and to an indictment for perjury: for otherwise the bond given, and the oath taken by such persons on their admission, instead of securing their honesty, would only serve as a screen to them in the commission of the grossest frauds,

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covenanted not to dig loam, clay, sand or gravel, except for the purpose of building on the land demised, with a proviso that if he should dig any of those articles for any other purpose, he should pay to the lessor twenty shillings a cart-load, and he afterwards dug great quantities of each article; upon a bill for discovery of the quantities, waiving any advantage of possible forfeiture of the term; a demurrer of the lessee, because the discovery might subject him to a payment by way of penalty, was overruled (g).

And a party shall not protect himself against relief in a court of equity, by alleging that if he answers the bill filed against him, he must subject himself to the consequences of a supposed crime, though the court will not force him by his own oath to subject himself to punishment; and therefore, in the case of a bill to inquire into the validity of deeds upon a suggestion of forgery, the court has entertained jurisdiction of the cause; and though it has not obliged the party to a discovery of any fact which might tend to show him guilty of the crime, has directed an issue to try whether the deeds where forged (h).

It should seem that a demurrer will also hold to any discovery which may tend to show the defendant guilty of any moral turpitude, as the birth of a child out of wedlock (i). But a mother has been compelled to discover where her child was born, though it might tend to show the child to be an

repp v. Cole, in Chan. Hil. Vacation, 1779.

⁽h) 2 Ves. 246. See also 1 Eq. Ca.

⁽g) Richards v. Cole, or Brod- Ab. 131, p. 11; Att. Gen. v. Sudell, Prec. in Chan. 214.

⁽i) Parker, 163; 2 Ves. 451; Franco v. Bolton, 3 Ves. 368; King v. Burr, 3 Meriv. 698.

alien (k); for that was not a discovery of any illegal act, or of any act which could affect the character of the defendant (l).

A demurrer will likewise hold to a bill requiring any a discovery which may subject the defendant to forfeiture (m) (1) of interest: as if a bill is brought to discover whether a lease has been assigned without license (n); or whether a defendant, entitled during widowhood (o), or liable to forfeiture of a legacy in case of marriage without consent (p). is married; or to discover any matter which may subject a defendant entitled to any office or franchise to a quo warranto (q). But if the plaintiff is alone entitled to the benefit of the forfeiture, and expressly waives (r) it by the bill, as in the case of a bill for discovery of waste (s), a demurrer will not hold; for the waiver gives the court a ground of equity to award an injunction, if the plaintiff sues for the forfeiture (t). If the discovery sought is of a matter which would show the defendant incapable of having any interest or title; as whether a person claiming a real estate under a devise was an alien, and consequently incapable of taking by

⁽k) Att. Gen. v. Duplessis, 2 Ves. Atk. 392; Chancey v. Fenhoulet, 2 287, ib. 494.

Ves. 265.

⁽l) 1 Meriv. 400.

⁽q) 1 Eq. Ca. Ab. 131, q. 10.

⁽m) Tothill, 69. (n) Lord Uxbridge v. Staveland;

⁽r) 1 Ves. 56; see above, p. 231, note (e).

¹ Ves. 56.

⁽s) 2 Atk. 393; Att. Gen. v. Vin-(o) Monnins v. Monnins, 2 Chan. cent, 2 Eq. Ca. Ab. 378; S. C. cited Com. R. 664, (2).

Rep. 68.

⁽t) 1 Ves. 56.

⁽p) Chauncey v. Tahourden, 2

⁽¹⁾ A defendant can never be compelled to criminate himself, or to make disclosures which will subject him to forfeiture. Salmon v. Clagett, 3 Bland's Ch. R. 125.

⁽²⁾ See the form of a demurrer in a case where such forfeiture is, not waived. Equity Draft. 82.]

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purchase (u); a demurrer will not hold. And where a devise over of an estate in case of marriage was considered as a conditional limitation, and not as a forfeiture, a demurrer to a bill for a discovery of marriage was overruled (x).

A defendant may in the same manner demur to a discovery which may subject him to any thing in the nature of a forfeiture (y); as where a discovery was sought, whether the defendant was educated in the popish religion, by which he might have incurred the incapacities in the statute 11 & 12 Will. III. (z); or whether a clergyman was presented to a second living, which avoided the first (a).

But where a person against whom a commission of bankrupt had issued, had brought actions against the assignees under the commission, disputing its validity, and particularly insisting that he had not been a trader within the meaning of the bankrupt laws, and in those actions the validity of the commission had been established; and the assignees filed a bill against him, stating these facts, and that being harassed by these actions, and threatened with other actions, they were not able to distribute the effects under the commission, and therefore praying a perpetual injunction to restrain further

⁽u) Att. Gen. v. Duplessis, Parker, 144.

⁽x) 2 Atk. 393; Lucas v. Evans, 3 Atk. 260; 2 Ves. 265.

⁽y) 3 Atk. 457. (1).

⁽z) Jones v. Meredith, Com. 661; and see ib. 664; Smith v. Read, 3 Bac. Ab. 800; 1 Atk. 527; 2 Ves. 394.

The 18 Geo. III. c. 60, the 31 Geo, III. c. 32, and the 43 Geo. III. c. 39. do not entirely remove these incapacities. But they are removed by the 10 Geo. IV. c. 7, s. 23.

⁽a) Boteler v. Allington, 3 Atk. 453.

^{(1) [}Lambert v. The People, 9 Cowen's R. 578; and see pages 194, 195, ante.]

actions, and requiring a discovery, amongst other things, of acts of trading, a demurrer to that discovery was overruled (b).

If a defendant has in conscience a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title, this circumstance in the situation of the defendant renders it improper for a court of equity to compel him to make any discovery which may hazard his title; and if the matter appears clearly on the face of the bill, a demurrer will hold (c). The most obvious case is that of a purchaser for a valuable consideration without notice of the plaintiff's claim (d). Upon the same principle a jointress may in many cases demur to a bill filed against her for a discovery of her jointure deed, if the plaintiff is not capable of confirming, or the bill does not offer to confirm, the jointure, and the facts appear sufficiently on the face of the bill; though ordinarily advantage is taken of this defence by way of plea (e).

This arises from that singularity in the jurisprudence of this country, produced by the establishment of the extraordinary jurisdiction of courts of equity distinct from the ordinary jurisdictions noticed in a former page, and necessarily creating a

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⁽b) Chambers v. Thomson, 1 Nov. (c) Se 1793, rep. 4 Bro. C. C. 434, affirmed, on rehearing, March, 1794. See Protector and Lord Lumley, Hardres, cote, 2 I 22. See also Selby v. Crew, 1 Anst. (e) C. 501.

⁽c) See Glegg v. Legh, 4 Madd. 193 (1).

⁽d) 2 Ves. Jr. 458; Sweet v. Southcote, 2 Bro. C. C. 66.

⁽e) Chamberlain v. Knapp, 1 Atk.52; 2 Ves. 450; 2 Ves. 662.

^{(1) [}Hartley v. O'Flaherty, 1 Beatty's R. 77. And see the form of such a demurrer, Willis, 479.]

distinction between legal and equitable rights (f). Where the courts of equity are called upon to administer justice upon grounds of equity against a legal title, they allow a superior strength to the legal title when the rights of the parties are in conscience equal; and where a legal title may be enforced in a court of ordinary jurisdiction to the prejudice of an equitable title, the courts of equity will refuse assistance to the legal against the equitable title where the rights in conscience are equal.

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Consequences of not demurring.

If the grounds on which a defendant might demur to a particular discovery appear clearly on the face of the bill, and the defendant does not demur to the discovery, but, answering the rest of the bill, declines answering to so much, the court will not compel him to make the discovery (g). But in general, unless it appears clearly by the bill that the plaintiff is not entitled to the discovery he requires, or that the defendant ought not to be compelled to make it, a demurrer to the discovery will not hold; and the defendant, unless he can protect himself by plea, must answer.

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Demurrer to a hill of discovery for want of parties, or for want of equity, or because the bill is for a discovery of part of a matter, or for multifariousness.

Where the sole object of a bill is to obtain a discovery, some grounds of demurrer, which if the bill prayed relief would extend to discovery as well as to the relief, will not hold. Thus a demurrer to a bill for a discovery merely will not hold for want of parties, for the plaintiff seeks no decree; nor, in general, for want of equity in the plaintiff's case for the same reason; nor because the bill is brought for the discovery of part of a matter, for that is

⁽f) 2 Ves. 573, 574.

P. Wms. 235; 1 Meriv. 401. See be-

⁽g) See Wrottesley v. Bendish, 3. low, Chap. II. sect. 2, Part 3.

merely a demurrer because the discovery would be insufficient. But it should seem a demurrer would hold to a bill for discovery of several distinct matters against several distinct defendants(1). For though of discovery, a defendant is always eventually paid his costs upon a bill of discovery (2) if both parties live, and the plaintiff by amendment of his bill does not extend it to pray relief, yet the court ought not to permit the defendant to be put to any unnecessary expense, as either the plaintiff or defendant may die pending the suit (g).

After an answer to a bill of discovery, when time for excepting to it as insufficient is expired, the defendant may apply for costs as a matter of course (h), unless the plaintiff shall in the mean time have obtained an order to amend his bill; which may be done either to obtain a fuller discovery, or, if the case appearing on the answer will warrant the proceeding, by adding to the bill a prayer for relief (i).

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(h) See 4 Ves. 746; Hewart v. Semple, 5 Ves. 86; Noble v. Garland, 1 Madd. 344. But, it seems that the v. Bailey, 15 Ves. 358. [Also M. Doutime within which the exceptions gall v. Miln, 2 Paige's C. R. 201.1 must be filed has latterly, under spe-

(g) See next page and notes (p) and cial circumstances, been extended or bills in the page 239. See Baring v. Prinsep, 1 Madd. R. nature of original bills. 526 (3).

(i) On this subject see Butterworth

Demurrers to

⁽q) page 239.

⁽¹⁾ A bill may be filed against several persons relative to matters of the same nature, forming a connected series of acts, all intended to defraud and injure the p'aintiffs, and in which all the defendants were, more or less, concerned, though not jointly in each act. Brinkerhoff v. Brown, 6 Johns. Ch. R. 139.

⁽²⁾ By the 41st order of Aug. 1841, "Where a defendant in equity files a cross-bill against the plaintiff in equity for discovery only, the costs of such bill, and of the answer thereto, shall be in the discretion of the court at the hearing of the original cause.

⁽³⁾ Only six weeks are allowed by the 16th order of May, 1845, art. 22.

Demurrers have hitherto been noticed with refe-Demurrers to bills of revivor. rence only to original bills. As every other kind of bill is a consequence of an original bill, many of the causes of demurrer which will apply to an original Demurrer to a bill will also apply to every other kind; but the pebill of revivor, for want of par- culiar form and object of each kind afford distinct causes of demurrer to each. Thus if a bill of revivor (1) does not show a sufficient ground for re-

(1) Where a bill is filed by a husband and wife, and the cause is heard on farther directions, after the death of the wife, in the absence of her personal representative, and afterwards her husband dies, and thereupon a bill of revivor is filed against his personal representative, a demurrer to such a bill on the ground that the personal representative of the wife is not before the court, will be overruled; for the plaintiff in the bill of revivor is entitled to have the suit placed in the same plight and condition in which it was at the time of the abatement in respect of which the revivor is sought; and if the proceedings were then imperfect, it is not the office of a demurrer to a bill of revivor to correct the imperfection. Metcalfe v. Metcalfe, 1 Keen, 74.

When bill was filed against detendant as executrix of her deceased husband, to reach property she had received as executrix, but which in equity was complainant's, and she died after decree in their favor, the surviving executor of the husband who had not been made party, could be brought in only by an original bill in nature of a bill of revivor and supplement; and the filing of a mere bill of revivor against him was improper. When bill of revivor filed against a defendant shows no title in complainant to revive as against him, he should demur to the bill, and not put in a plea, where no new fact is brought forward which in itself constitutes a bar to the revivor. And in this court a plea cannot be substituted in place of demurrer. Such a plea was overruled with liberty to defendant to demur, unless complainants thought proper to amend their bill by making it an original bill in the nature of a bill of revivor and supplement and bringing all proper parties before the court. Evertson v. Ogden, 8 Paige's R. 276-7, 275.

When, after a bill was filed to set aside a transfer of complainant's real estate for fraud, complainant died, leaving six children heirs at law, one of which was wife of a defendant in the original suit; and the other five filed a bill of revivor and supplement making their coheir defendant with her husband, and the other defendants in the original bill; whereon the latter demurred on ground that she should have been

viving the suit (k), or any part of it (l), either by or against (m) the person by or against whom it is brought, the defendant may by demurrer show cause against the revival (n) (1). Indeed though the defendant does not demur, yet if the plaintiff does not show a title to revive, he will take nothing by his suit at the hearing (o) (2). A demurrer will also in many cases hold to a bill of revivor brought singly for costs (p): the court in general not permitting a suit to be revived for that purpose only, except where the costs have been actually taxed before the abatement happened (q) (3).

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- (k) Humphreys v. Incledon, Dick. 38; Harris v. Pollard, 3 P. Wms. 348.
 - (l) 1 Eq. Ca. Ab. 3, 4.
- (m) University College v. Foxcroft, 2 Ch. Rep. 244.
 - (n) 3 P. Wms. 348.
 - (o) 3 P. Wms. 348

(p) 2 Eq. Ca. Ab. 3; 2 Ves. jun. 315; 10 Ves. 572; Jupp v. Geering, 5 Madd. 375.

(q) Hall v. Smith, 1 Bro. C. C. 438: Morgan v. Scudamore, 2 Ves. Jun. 313; S. C. 3 Ves. 195; Lowten v. Mayor and Commonalty of Colchester, 2 Meriv. 113; 3 Madd. 377.

made complainant, and that the supplemental matter in the bill was improper, held on appeal from Vice-Chancellor, allowing the demurrer, that as wife could not join the suit against her husband, except by her next friend, and that even then the suit could not be brought in her name without her consent; and that under the circumstances, it was not necessary to aver that she refused to join the other heirs in the bill of revivor; and that if supplemental matter was improperly added to the bill, it furnished no reason to demur to the whole bill, but should have been to the supplemental matter only, the decision of the Vice-Chancellor was reversed and the cause directed to stand revived. Randolph v. Dickerson et al., 5 Paige's R. 517.

- (1) [Thornton v. Pellatt, 11 Price, 733. See the form of a demurrer, Willis, 481.]
- (2) [It is said in Lewis v. Bridgman, 2 Sim. 465, that to prevent a suit from being revived, either a plea or demurrer must be put in to it; and that answer insisting upon the plaintiff's having no right is not sufficient.]
- (3) A bill of revivor cannot be filed merely for costs by the personal Bill of revivor representative of a defendant to a bll which has been dismissed with for costs. costs. Andrews v. Lockwood, 15 Law J. 285, V. C. E.

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Demurrers to supplemental

If a supplemental bill is brought upon matter arising before the filing of the original bill, where the suit is in that stage of proceeding that the bill may be amended, the defendant may demur (r). a bill is brought as a supplemental bill upon matter arising subsequent to the time of filing the original bill against a person who claims no interest arising out of the matters in litigation by the former bill, the defendant to the bill thus brought as a supplemental bill may also demur; especially if the bill prays that he may answer the matters charged in the former bill. These, however, are grounds of demurrer arising rather from the plaintiff's having mistaken his remedy, than from his being without remedy.

Demurrers to cross-bills.

A cross-bill having nothing in its nature different from an original bill, with respect to which demurrers in general have been considered, except that it is occasioned by a former bill, there seems no cause of demurrer to such a bill which will not equally hold to an original bill. And a demurrer for want of equity will not hold to a cross-bill filed by a defendant in a suit against the plaintiff in the same suit touching the same matter. For being drawn into the court by the plaintiff in the original bill, he may avail himself of the assistance of the court, without being put to show a ground of equity

quently, but be immaterial, the defen- Bowyer v. Bright, 13 Price, 316.] dant may also demur. See Milner v.

(r) Baldwin v. Macknown, 3 Atk. Lord Harewood, 17 Ves 144; Adams 817; 2 Madd. R. 387 (1); or, if v. Dowding, 2 Madd. R. 53; Ibid. 388. the matter should have arisen subse- [Swan v. Swan, 7 Price 518. And see

^{(1) [}Stafford v. Howlett, 1 Paige's C. R. 200. See the form of a demurrer, Willis, 482.]

to support its jurisdiction (s), a cross-bill being generally considered as a defence (t) (1).

A bill filed by the direction of the court for the bills filed by the direction of the purpose of obtaining its decree touching some matter not in issue by a former bill, or not in issue between the proper parties, does not seem liable to any peculiar cause of demurrer. Indeed, being exhibited by order of the court upon hearing of another cause, there is little probability that such a bill should be liable, in substance, to any demurrer.

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The constant defence to a bill of review for error bills of review, apparent upon a decree has been said to be by and supplemental bills of the plea of the decree, and demurrer against opening the enrolment (u). There seems, however no necessity for pleading the decree, if fairly stated in the bill (3): the books of practice contain the forms of a demurrer only to such a bill, and there are cases accordingly (x) (4).

1 Eden, R. 190.

(t) 3 Atkyns, 812.

Smith v. Turner, 1 Vern. 273; 2 Atk; v. Kenrick, 5 Bro. P. C. 244; and ib. 534. See also 3 Atkyns, 627; 248; in which case the defendant ap-

(8) Doble v. Potman, Hardres, 160; O'Brien v. O'Connor, 2 Ball. & B. 146. (2)

(x) Slingsby v. Hale, 1 Ca. in Cha. (u) Dancer v. Evett, 1 Vern. 392; 122; 1 P. Wms. 139; and see Jones

(3) [Webb v. Pell, 3 Paige's C. R. 368.]

⁽¹⁾ By the 42d order of August, 1841, "Where a defendant in equity files a cross-bill for discovery only against the plaintiff in equity, the answer to such cross-bill may be read and used by the party filing such cross-bill, in the same manner, and under the same restrictions, as the answer to a bill praying relief may now be read and used."

^{(2) [}And see Webb v. Pell, 3 Paige's C. R. 368. For the form of a demurrer to a bill of review, see Willis 483; 2 Equity Draftsman, 92, (2d edition.)]

^{(4) [}Lord Chancellor Lifford is reported to have said, in Lindsay v. Bell, Finlay's (Irish) Index, that a case can hardly arise in which a demurrer can be put in to a bill of review.]

On argument of a demurrer to a bill of review where several errors in the decree have been assigned, if the plaintiff should prevail only in one, the demurrer must be overruled, as one error will be sufficient to open the enrolment; and on argument of a demurrer to a bill of review for error apparent in the decree, the court has ordered the defendant to answer, saving the benefit of the demurrer to the hearing and on the hearing has finally allowed the demurrer (y).

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Where the decree has been pronounced above twenty years, the length of time is good cause of demurrer (z).

Where any matter beyond the decree is to be offered against opening the enrolment, that matter must be pleaded (a); and it has been said that length of time must be pleaded to a bill of review, and that otherwise the plaintiff will not have the benefit of exceptions, as infancy, coverture, or the like (b).

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pears to have pleaded the decree enrolled in bar of the first bill, which did not state the decree, but to have demurred alone to the bill of review. And in *Helbut* and *Philpot*, in the, House of Lords, 11 March, 1725, the defendant demurred alone to a bill of review, and the demurrer was allowed; and the order affirmed by the Lords; and see *Denny* v. *Filmore*, 1 Vern 135; S. C. 2 Freeman, 172.

- (y) Denny v. Filmer, 2 Freeman, 172.
- (z) Edwards v. Carroll, 2 Bro. P. C. 88, Toml. Ed.; and see Smythe v. Clay, 4 Bro. C. C. 539, n.; S. C. 1 Bro. P. C. 453, Toml. Ed.; S. C. Ambl. 645.
- (a) See Hartwell v. Townsend, 2 Bro. P. C. 107, Toml. Ed.
- (b) Gregor v. Molesworth, 2 Ves. 109. See, however, Sherrington v Smith, 2 Bro. P. P. 62, Toml. Ed. : Gorman v. M'Cullock, 5 Bro. P. C. 597, Toml. Ed.; see 3 P. Wms. 287, note B, and post, p. 251, as to a demurrer on the ground of length of time; and it should seem that if the plaintiff can allege any exception to a positive rule, he ought to do so by his bill. In Lytton v. Lytton, 4 Bro. C. C. 441, the exception was stated in the bill, and admitted by the answer. If length of time must be pleaded, yet the plaintiff can have no benefit of exception not stated in the bill, unless it should be required that the plea should be supported by averments negativing every possible exception, to which there seem to be great odjections.

A bill of review upon the discovery of new matter, and a supplemental bill of the same nature, being exhibited only by leave of the court (1), the ground of the bill is generally well considered before it is brought; and therefore in point of substance it can rarely be liable to a demurrer. But if brought upon new matter, and the defendant should think that matter not relevant, probably he might take advantage of it by way of demurrer, although the relevancy ought to be considered at the time leave is given to bring the bill (b). Bills in the nature of bills of review do not appear subject to any peculiar cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill. If upon argument of a demurrer to a bill of review the demurrer is allowed, the order allowing it, being enrolled, is an effectual bar to another bill of review (c).

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If upon the face of a bill to carry a decree into bills to carry decrees into the plaintiff appears to have no right to carry decrees into execution. the benefit of the decree the defendant may demur.

Bills in the nature of bills of revivor and supplebills in the nature of bills of ment are liable to objections of the same sort as revivor and supmay be made to the kinds of bills of whose nature they partake.

plement.

In addition to the several particular causes of de- Demurrers for irregularity. murrer applicable to particular kinds of bills, it may be observed that any irregularity in the frame

(b) 2 Atk. 40. See what is stated in regard to a mere supplemental bill, Cha. 133; S. C. 1 Vern. 135, and ib. 17 Ves. 148, 149; 2 Madd. R. 61; 417; Pitt v. Earl of Arglass, ib 441; and see above, 239, note (r).

(c) See Denny v. Filmer, 2 Ca. in Woots v. Tucker, 2 Vern. 120.

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of a bill of any sort may be taken advantage of by demurrer. Thus if a bill is brought contrary to the usual course of the court, a demurrer will hold (d) (1). As where, after a decree directing incumbrances to be paid according to priority, the plaintiff, a creditor, obtained an assignment of an old mortgage, and filed a bill to have the advantage it would give him by way of priority over the demands of some of the defendants (e). This was a bill to vary a decree (2), and yet was neither a

(d) See Wortley v. Birkhead, 3 3; Ogilvie v. Herne, 13 Ves. 563; Atk. 809; S. C. 2 Ves. 571; Lady Maule v. Duke of Beaufort, 1 Russ. Granville v. Ramsden, Bunb. 56; R. 349.

Earl of Darlington v. Pulteney, 3 (e) 3 Atk. 811.

Ves. 386; Fletcher v. Tollett, 5 Ves.

Supplemental bill seeking to vary a decree.

(2) Where a bill is filed against executors and the supposed representative of a deceased executor, praying for an administration of the testator's estate, and impeaching an account alleged to have been fraudulently settled between the surviving executors and the deceased executor; but it appears, at the hearing, that the representative of the deceased executor is not a party to the suit; and the decree therefore directs that the account settled with the deceased executor shall not be disturbed; and then a bill, purporting to be a supplement bill, is filed, bringing before the court the personal representative of the deceased executor and the assignees of a bankrupt executor, a demurrer to so much of the bill as seeks for an account of the receipts of the deceased executor, even though put in by the assignees of the bankrupt executor, will be allowed; because, to that extent, the bill is not supplemental, but is an original bill seeking to vary the former decree. Wilson v. Todd, 1 My. & C. 42.

But where a testator directs his estate to be converted, and invested for certain persons for life, with remainder over, and the executors, instead of converting, permit the successive tenants for life to enjoy the leasehold part of his estate until the expiration of the terms; and the remaindermen file a bill against the representative of the executors after the death of the tenants for life for an account and distribution; but in consequence of representations made by the representatives of

⁽¹⁾ For an instance of a demurrer to a bill on the ground of its having been filed without leave of the court, see *Bainbrigge* v. *Baddeley*, 10 Jur. 765.

bill of review, nor a bill in nature of review, which are the only kinds of bills which can be brought to affect or alter a decree (f), unless the decree has been obtained by fraud (g). So if a supplemental bill is brought against a person not a party to the original bill, praying that he may answer the original bill, and no reason is suggested why he could not be made a party to the original bill by amendment, he may demur (h). If an irregularity arises in any alteration of a bill by way of amendment, it may also be taken advantage of by demurrer. if a plaintiff amends his bill, and states a matter arisen subsequent to the filing of the bill (i), which consequently ought to be the subject of a supplemental bill, or bill of revivor. But if a matter arisen subsequent to the filing of the bill, and properly the subject of a supplemental bill, is stated by amendment, and the defendant answers the amend-

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(f) Arg do 3 Atk. 811; Read v. v. Molesworth, 1 Eden. R. 25; 13 Hambey, 1 Ca. in Cha. 44; S. C. 2 Ves. 564.

Freem. 179; 13 Ves. 564.

(h) Baldwin v. Mackown, 3 Atk.

(g) Argdo 3 Atk. 811; Galley v. Baker, Ca. T. Talb. 199; Manaton

(i) 1 Atkyns, 291; Pilkington v. Wignall, 2 Madd. 240 (1).

the executors in ignorance of the circumstances, the remaindermen waive an account, and a decree is made for distributing the residue; and afterwards the remaindermen discover the breach of trust in respect of the leaseholds, and file a supplemental bill for relief, the court notwithstanding the former decree, will order the representatives of the executors to pay what was the value of the lease at the time of the testator's death. And this will be the case, even though the title to the lease was bad, if no advantage was taken of the badness of the title by the owners of the property. Mehrtens v. Andrews, 3 Beav. 72.

(1) [There is the form of a demurrer in such a case in Equity Draft. 91, (2d edit.); and a note added whereby it appears that the form there given was drawn according to a precedent of a similar de-

m urrer made out by Lord Redesdale when at the bar.]

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ed bill, it is too late to object to the irregularity at the hearing (i). For as the practice of introducing by supplemental bill matter arisen subsequent to the institution of a suit has been established merely to preserve order in the pleadings, the reason on which it is founded ceases when all the proceedings to obtain the judgment of the court have been had without any inconvenience arising from the irregularity (k).

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Having thus considered the several grounds of demurrer, it may be proper to observe some particulars with respect to the frame of demurrers, the manner in which they are offered to the court, and the manner in which their validity may be determined, or their consequences avoided.

Signature of counsel. Oath.

A demurrer must be signed by counsel (1); but is put in without oath, as it asserts no fact, and relies merely upon matter apparent upon the face of Rules as to order for time to the bill (m). It is therefore considered, that the dedemur, and as to overroing a defendant may by advice of counsel, upon the sight nurrer by answer or ples. of the bill only, be enabled to demur thereto (n). and for this reason it is always made the special condition of an order giving the defendant time to demur, plead, or answer to the plaintiff's bill, that he shall not demur alone. Whenever, therefore, the defendant has obtained an order for time, and is afterwards advised to demur, he must also plead to or answer some part of the bill (o). It has been

the Rolls, 13 July, 1782.

⁽k) See above, p. 239.

⁽¹⁾ See Ord. in Cha. 172, Ed. Bea.

⁽m) 2 Ves. 247; 1 Madd. R. 236.

⁽n) Ord in Cha. 172, Ed. Bea.

⁽i) Belchier against Pearson, at for time to answer generally, it would be presumed that his case does not require the usual indulgence to the extent mentioned in the text; and the order would be drawn up accordingly, see 10 Ves. 448; 1 Ves. & B. 186; (0) If the defendant should apply and he would be bound to answer, 10

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held, that answering to some fact immaterial to the cause, and denying combination (o), do not amount to a compliance with the terms of such an order; and therefore, upon motion, a demurrer accompanied by such an answer has been discharged (p). This rule has been probably established under a notion that time is not necessary to determine whether a defendant may demur to a bill or not, and a supposition that a demurrer may be filed merely for delay. But whether a bill may be demurred to is sometimes a subject of serious and anxious consideration: and the preparation of a demurrer may require great attention, as if it extends in any point too far it must be overruled. Great inconvenience therefore may arise from a strict adherence to this rule. For it often happens

Ves. 446; but a plea would be considered within the meaning of this term. See Roberts v. Hartley, 1 Bro. C. C. 56; De Minkuitz v. Udney, 16 Ves. 355; Barber v. Crawshaw, 6 Madd. 284, unless, perhaps, it were of a description not required to be put in upon oath, see Phillips v. Gibbons, 2 Ves. & B. 184; and see Anon, 2. P. Wms. 464; 3 P. Wms. 81; but the defendant would not be allowed to demuralone. Kenrick v. Clayton, 2 Bro. C. C. 214; S. C. Dick. 685; or even to answer and demur. Taylor v. Milner, 10 Ves. 444; Mann v. King, 18 Ves. 297, except under peculiar circumstances, and upon leave granted by the court, on a special application for that purpose. See Bruce v. Allen, 1 Madd. R. 556; Sherwood v. Clark, 9 Pri. Ex. R. 259 (1).

- (o) As to the necessity of denying a general charge of combination, see supra, p. 44. The charge of combination, in order to be material, with the view of preventing a demurrer for want of equity by parties not interested, must be specific. Smith v. Snow, 3 Madd. 10.
- (p) Stephenton v. Gardiner, 2 P. Wms. 286; 4 Vin. Abr. 442; Lee v. Pascoe, 1 Bro. C. C. 78; and see Kenrick v. Clayton, 2 Bro. C. C. 214; S. C. Dick. 685; Lansdown v. Elderton, 8 Ves. 526; Tompkin v. Lethbridge, 9 Ves. 178; 10 Ves. 446, 447, 448; 2 Ves. & B. 123.

^{(1) [}By the New-York practice, after a general order for further time to answer, (under the 125th rule,) the defendant cannot put in a demurrer, except on special leave of the court. Burrall v. Raineteaux, 2 Paige's C. R. 331.]

that a defendant cannot answer any material part of the bill without overruling his demurrer; it being held that if a defendant answers to any part of a bill to which he has demurred, he waives the benefit of the demurrer (q) (1); or if he pleads to any part of a bill before demurred to, the plea will overrule the demurrer (r). For the plaintiff may reply to a plea or answer, and thereupon examine witnesses, and hear the cause; but the proper conclusion of a demurrer is to demand the judgment of the court whether the defendant ought to answer to so much of the bill as the demurrer extends to, or not (s). The condition, that the defendant shall not demur alone, ought therefore, perhaps, to be considered liberally; and it has been formerly said, that the court will not incline to discharge a demurrer if the defendant denies combination only where he cannot answer further without overruling his demur-

(q) See Hester v. Weston, 1 Ves. (r) Dormer v. Fortescue, 2 Atk. 463; Jones v. Earl of Strafford, 3 282.
P. Wms. 79; Abraham v. Dodgson, (s) 3 P. Wms. 80.
2 Atk. 157.

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⁽¹⁾ Where answer covers part of the discovery to which demurrer is interposed, it overrules the demurrer. As where the answer set up a defence as purchaser without notice, and which, if true, would be a defence to the equitable right claimed, under a will; and its concluding allegation denied all knowledge as to any of the matters of the bill other than those which defendant had answered: and closed with the general traverse of the answer; and thereby put in issue and answered all the matters attempted to be covered by the demurrer; held, that the demurrer which was to all the discovery and relief sought in relation to the will, was overruled by such part of the answer. Spofford et al. v. Manning, 6 Paige's R. 387, 388. 383. By the 37th order of August, 1841, "no demurrer or plea shall be held bad and overruled upon argument because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea."

rer (s). Indeed any material answer must in many cases overrule the demurrer; so that giving a defendant time to demur, plead, or answer, not demurring alone, is often in effect giving leave to do a thing, but clogging the permission with a condition which makes it nugatory: and though the rule was first adopted upon a reasonable ground to prevent unnecessary delay, it may, if strictly observed, contradict the maxim, that a court of equity ought not, for form sake, to do a great injustice (t). However the modern practice is according to the original strictness of the rule (u); and it may be better, where the case requires it, to relax the rule upon special application to the court (x) than to permit it to be evaded (y). Indeed in some cases an answer to any part of the bill may overrule the demurrer; for if the ground of demurrer applies to the whole bill, the answering to any part is inconsistent (z); and therefore, when the ground of demurrer was the general impropriety of the bill, and that the defendant ought not therefore to be compelled to answer it, his answer to an immaterial part, in compliance with the order for time which he had obtained, overruled his demurrer (a).

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⁽s) See Done y. Peacock, 3 Atk. 726; see above, p. 209, note (b).

⁽t) 1 Ves. 247.

⁽u) Attorney Gen. v. Jenner, in Ch. 9 Nov. 1738; Sir John Dyneley Goodere v. Dean and Chapter of Worcester, in Exchequer, 1777. Lee v. Pascoe, in Chan. East. 1780; 1 Bro. C. C. 77; 8 Ves 527; 10 Ves. 447. See above, pp. 246, 247, and notes (o), (p), and (q).

⁽x) And this upon a special ground,

the court will do. See above, p. 246, note (o).

⁽y) It seems that very little by way of answer will satisfy the terms of the order; but that the court considers the practice in this respect to be guarded by the honor of the counsel. See *Tompkin v. Lethbridge*, 9 Ves. 178; 11 Ves. 73.

⁽z) Tidd v. Clare, Dick. 712.

⁽a) Ruspini v. Vickery, in Chan. 16 Jan. 1793.

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Admission by demurrer of the

truth of the statements of

As a demurrer relies merely upon matter apparent on the face of the bill, so much of the bill as the demurrer extends to is taken for true (b) (1); thus if a demurrer is to the whole bill, the whole (c) is taken for true; if it is to any particular dis-

(b) 2 Ves. & Bea. 95; 1 Madd. R. 565. [Pryor v. Adams, Call's R. 391.1

(c) That is, every thing necessary to support the plaintiff's case which is well charged in the bill. 1 Ves. 426, 427; 1 Ves. Jun. 289. Facts on a demurrer are taken to be true;

that is, facts which are well and materially alleged. Lord Hardwicke in Butler v. Royal Exchange Assurance, in Chan. 22 Nov. 1749; 1 Ves. Jun. 78, 289; 3 Meriv. 503; 1 Madd. 565. [Braband v. Hoskins, 3 Price, 31.1

As against whom allegations are admitted by a demurrer.

(1) A party demurring admits the truth of the allegations in the bill not only as against himself but also as against another person. So that if a bill alleges that a person has ceased to have interest, a party demurring admits that fact, and cannot object to the suit on account of such person not having been made a party to the record. Earle v. Holt, 9 Jur. 773, V. C. W. But see Penfold v. Nunn. 5 Sim. 405.

Demurrer assumes correctness of a statement of the purport of a deed.

Where a bill states the purport of a deed in the possession of the defendant, the court, upon demurrer, must assume such statement to be correct; so that the demurring party is not at liberty to read the deed itself, for the purpose of disproving such statement, even though the bill, for greater certainty, refers to the deed. For, to ho'd otherwise, would be to give the defendant an advantage depending upon the accident of his having the custody of the deed, and might in effect be to decide the question raised by the demurrer upon matter dehors the record. Campbell v. Mackay, 1 My. & C. 613.

Demurrer only admits for the purpose of the argument.

Where a defendant demurs to a bill for want of equity, he is not to be taken to have confessed the truth of the statements and charges. He only admits them for the purpose of showing the want of equity even upon the assumption that the statements and charges in the bill are true. All that he says by a demurrer is this: "even admitting (just for the sake of arguing upon your own grounds, as to the existence of the equity which you assert) that all you say is true, still you have no equity. Without putting myself to the trouble, expense, and delay of disproving your allegations, but taking you on your own grounds, I can show that you have no equity against me." See the Lord Chancellor's remarks in Thompson v. Barclay, 9 Law J. (O. S.) 216, 217.

covery, the matter sought to be discovered, and to which the demurrer extends, is taken to be as stated in the bill; and if the defendant demurs to relief only, the whole case made by the bill to ground the relief prayed is considered as true. A demurrer is therefore always preceded by a protestation against the truth of the matters contained in the bill; a practice borrowed from the common law, and probably intended to avoid conclusion in another suit.

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The admission by a demurrer of the truth of the Whether a defence founded facts stated in the bill has been considered as one on length of time can be reason why a defence founded on length of time, made by demurrer. though apparent on the face of the bill, without any circumstance stated to avoid its effect, cannot generally be made by demurrer (c) (1). Upon a demurrer to a bill brought to impeach transactions which had passed twenty-eight years before the bill was filed, on the ground of fraud, without any sufficient cause shown for not instituting the suit sooner, it was said by the court that the party who

his claim is barred by lapse of time, and no ground of exception, as infancy, or the like, be alleged therein, it seems that, contrary to the opinion of Lord Hardwicke, expressed in a case in which the suit was for redemption of a mortgage, after quiet possession

(c) But, if the plaintiff's case be by the mortgagee of more than so stated in the bill as to show that twenty years, (see Aggas v. Pickerell, 3 Atk. 225; and see 2 Ves. Jun. 84,) the defendant may demur. Beckford v. Close, cited 3 Bro. C. C. 644; 4 Ves. 476, ib. 479; Foster v. Hodgson, 19 Ves. 180. [See 2 Revised Statutes N. Y. 301.]

(1) A defendant may avail himself of the statute of limitations by demurrer, when the application of the statute to the suit appears on the face of the bill. Houre v. Peck, 6 Sim. 51. 3 Bro. C. C. R. Perkins Ed. 633. 646, notes; Freake v. Cranfeldt, 3 My. & Cr. 499; Tyson v. Pole, 3 Younge & Col. 266; McDowl v. Charles, 6 J. C. R. 132; Costar v. Murray, 5 J. C. R. 521; Humb rt v. Rector, &c. Trinity Church, 7 Paige C. R. 195; Van Hook v. Whitlock, 7 Paige C. R. 373; S. C. 24 Wend. R. 587; Waller v. Demint, 1 Dana, 92.

demurs admits every thing well pleaded, in manner

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and form as pleaded; and a demurrer ought therefore in a court of law to bring before the court a question of law merely; and in a court of equity, a question of law or equity merely. The demurrer therefore must be taken to admit the whole case of fraud made by the bill: and the argument to support it must be, not that a positive limitation of time has barred the suit, for that would be a pure question of law, but that from long acquiescence it should be presumed that the fraud charged did not exist, or that it should be intended that the plaintiff had confirmed the transaction, or had released or submitted upon such consideration as to bar himself from the general equity stated in the bill. This must be an inference of fact, and not an inference of law; and the demurrer must be overruled, because the defendant has no right to avail himself by demurrer of an inference of fact upon matter on which a jury in a court of law would collect matter of fact to decide their verdict, if submitted to them, or a court would proceed in the same manner in equity. What limitation of time will bar a suit where there is no positive limitation, or under what circumstances the lapse of time ought to have that effect, must depend on the facts of the particular case, and the conclusion must be an inference of fact and not an inference of law(d), and therefore cannot be made on a demurrrer (e).

⁽d) See Cuthbert v. Creasy, 6 Madd. 189.

⁽e) Ld. Deloraine v. Browne, in Chan. 13 & 14 June, 1792; 3 Bro. C. C. 633. But see p. 241, as to demurrers to bills of review. In Tobin

v. Beckford, on appeal from Jamaica 26 July, 1784, a demurrer to a bill to redeem on account of length of time was allowed by the council—present Kenyon, M. R.—after consideration.

A demurrer must express the several causes (f) Expression of the causes of deof demurrer (g) (1); and in case the demurrer murrer, and the parts to which it applies. doe snot go to the whole bill, it must clearly express the particular parts of the bill demurred to (h). If Partial allow a dea demurrer is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, it was generally considered that the demurrer being entire must be overruled (i) (2). But there

Partial allowmurrer.

- (f) See 3 Madd. 8; 1 Jac. R. 467; and see Harrison v. Hogg, 2 Ves. Jun. 323.
- (g) Peachie v. Twycrosse, Cary Rep. 113; Ord. in Chan. Ed. Bea. 77,
- (h) Chetwynd v. Lindon, 2 Ves. 451; Devonsher v. Newenham, 2 Sch. & Lefr. 199. And this must be done, not by way of exception, as by demurring to all, except certain parts of

the bill, but by positive definition of the parts to which he thereby seeks to avoid answering. See Robinson v. Thompson, 2 Ves. & Bea. 118; Weatherhead v. Blackburn, 2 Ves. & Bea. 121; sed vide Hicks v. Raincock, 1 Cox R. 40.

(i) 1 Ves. 248; Earl of Suffolk v. Green, 1 Atk. 450; Todd v. Gee, 17 Ves. 273; 1 Swanst. 304; 1 Jac. R.

(1) [Nash v. Smith, 6 Day's R 421; 5th Rule of South Carolina Prac. 1 Desseau, 57. It must not be a speaking demurrer. A speaking demurrer is, where a fact is introduced which is necessary to support the demurrer. Davis v. Williams, 1 Sim. 7. It is a general rule, that a speaking demurrer is bad; i.e. when it contains argument in the body of it; if, for instance, the demurrer says, "in or about the year 1770, which is upwards of twenty years before the bill filed." (2 Ves. Jr. 83.) A demurrer, also, to any thing but what appears on the face of the bill, is considered as a speaking demurrer. (2 Ves. 245.) Lube, 340. And as to other cases upon speaking demurrers, see Cawthorn v. Charlie, 2 Sim. & Stu 129; Davis v. Williams, 1 Sim. 8.]

A speaking demurrer is one which introduces some new fact or averment, which is necessary to support the demurrer, and which does not appear distinctly upon the face of the bill. Where defendant put in a general demurrer to the bill, and stated as grounds of demurrer, several matters appearing on the face of the bill, an objection that it was a speaking demurrer, was held not well taken. Brooks v. Gibbons et al., 4 Paige R. 375, 374. See also Kuypers v. Reformed Dutch Church, 6 Paige 570; Pendt bury v. Walker, 4 Younge & Coll. 424; McComb v. Arms'rong, 2 Molloy's Ch. R. Irish,) 295.

(2) Demurrer bad in part is bad in toto. 5 Johns. C. R. 186; 1 Id. 51. Contra, 2 Bibb, 484.) Where the bill is charged a "fraudulent conceal254

are instances (k) of allowing a demurrer in part (l); and a defendant may put in separate demurrers to separate and distinct parts of a bill for separate

467 (1). But though a demurrer can- 2 Bro. P. C. 514, Toml. Ed. not be good in part and bad in part and bad as to the others; see 8 Ves.

Ca. Ab. 759; Radcliffe v. Fursman, Baker v. Mellish, 11 Ves. 68. (3)

403, 404.

(1) Although this is not now the (8 Ves. 403; 11 Ves. 70; 17 Ves. practice, the court will in some in-280), (2) it appears that where such stances, on the argument of a demura mode of defence has been resorted rer, grant leave, upon overruling it, to by several defendants jointly, it to the defendant to put in another less it may be good as to some of them, extended. (Thorpe v. Macauley, 5 Madd. 218), and will, even after it has been overruled, sometimes be in-(k) Rolt v. Lord Somerville, 2 Eq. duced to grant a similar indulgence.

ment of title, while complainant was making improvements," a general demurrer to the whole bill to such a charge of fraud is bad. The charge of fraud direct and positive, must be met otherwise than by a demurrer. Carter v. Longworth, et al., 4 Ohio R. 836, condensed from 4 Hammond, 384; see also Higgins v. Burnet, 5 Johns. C. R. 184.

Held, on a joint demurrer of husband and wife, that it may be sustained in her favor and overruled as against her husband. As on bill for specific performance of contract for sale of her realty, demurred to by them on the ground that her acknowledgment on private examination was not taken. Demurrer was held well taken by her but as there was an equitable claim against husband for the fulfilment of the contract and therefore he should answer, the demurrer was overruled as to him. Wooden et al., v. Morris & Wife, 2 Green, C. R. (N. J.) 67. 65.

(1) [And see Verplanck v. Caines, 1 J. C. R. 57; Le Roy v. Veeder, on appeal, 1 J. C. 417; Laight v. Morgan, on appeal, 1 J. C. 429; S. C. 2 C. C. E. 344; Kimberly v. Sells, 3 J. C. R. 497; Livingston v. Livingston, 4 Ib. 294; Le Roy v. Servis, 1 C. C. E. 1; Higginbotham v. Barnet, 5 Ib. 184; Briam v. Briam, Vernon & Scriven's (Irish) R. 84; Graves v. Downey, 3 Monroe's R. 125: Castleman v. Veitch, 3 Randolph's R. 598; Cheetham v. Crook, 1 M'Cleland & Y. 307.7

(2) But see Verplanck v. Caines, supra. It has been said, in Kentucky, that a demurrer to a bill may be overruled in part and sustained in part. Pope v. Stansbury, 2 Bibb, 484.]

(5) This is not allowed in the New-York chancery. 49th Rule. See Rawley v. Eccles, 1 Sim. & Stu. 511.]

and distinct causes (m). For the same ground of demurrer frequently will not apply to different parts of a bill, though the whole may be liable to demurrer; and in this case one demurrer may be overruled upon argument, and another allowed (n) (1).

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If the plaintiff conceives that there is not suffi- Proceedings upcient cause apparent on the bill to support a demur- murrer. rer put in to it, or that the demurrer is too extensive, or otherwise improper, he may take the judgment of the court upon it (2); and if he conceives that by amending his bill he can remove the ground of demurrer, he may do so before the demurrer is argued, on payment of costs, which vary according to the state of the proceedings (o). But after a demurrer to the whole of a bill has been argued and allowed, the bill is out of court, and therefore cannot be regularly amended (p). To avoid this

⁽m) 3 P. Wms. 149; Roberdeau v. Canc. 565; 1 Harrison, Chan. Pract. Rous, 1 Atk. 544.

⁽n) North v. Earl and Countess of Strafford, 3 P. Wms. 148 (1).

^{448;} Anon. 9 Ves. 221; 1 Alm. Cur. Dick, 701. (3)

⁽p) See above, p. 15, note (t); Lord

Coningsby v. Sir Jos. Jekyll, 2 P. W. (o) Anon. Mosely, 301; 1 Ves. Jun. 300, and note, and Watkins v. Bush,

^{(1) [}Same principle recognised in Little v. Archer, 1 Hogan, 55.]

^{(2) [}Where the defendant files a faulty and informal demurrer to a bill in chancery, the complainant is not entitled to have it dismissed, but must set it down for argument. Hurst v. Hurst, C. C. U. S. Penn. Apr. 1806. MS. Coxe's Dig. p. 145.

There should be no joinder in demurrer. The cause is to be set down for argument of the demurrer. Beauchamp v. Gibbs, 1 Bibb's (Kentucky) R. 481. By the practice of the State of New-York, either party may notice a demurrer for argument. 47th Rule.

On the argument, the complainant is bound by the case stated in the bill in relation to the discovery sought, and will not be allowed to maintain his right to discovery upon a suggestion ore tenus at the bar not consistent with the case made in the bill. Little v. Archer, supra.]

^{(3) [}Also Lyon v. Tallmadge, 1 J. C. R. 184.]

[CHAP. II.

consequence the court has sometimes, instead of deciding upon the demurrer, given the plaintiff liberty to amend his bill, paying the costs incurred by the defendant; and this has been frequently done in the case of a demurrer for want of parties (q). Where a demurrer leaves any part of a bill un-

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touched, the whole may be amended notwithstanding the allowance of the demurrer; for the suit in that case continues in court, the want of which circumstance seems to be the reason of the contrary practice where a demurrer to the whole of a bill has been allowed. A demurrer being frequently on matter of form is not in general a bar to a new bill; but if the court upon a demurrer has clearly decided upon the merits of the question between the parties, the decision may be pleaded in bar of another suit (r).

Necessity for a

A demurrer being always upon matter apparent upon the face of the bill, and not upon any matter alleged by the defendant, it sometimes happens

demurrer, will sometimes give the set the cause on foot again, and to plaintiff leave to amend; see Mayor, &c. of London v. Levy, 8 Ves. 398; Edwards v. Edwards, 6 Madd. 255; allowance, the court might be in-

(a) And the court upon allowing a duced, under some circumstances, to authorize an amendment to the bill. See 11 Ves. 72 (1).

(r) See the cases upon demurrers and it seems probable that, even after to bills of review cited above, p. 242, note (a).

^{(1) [}Also Marshall v. Lovelass, Cameron & Norwood's (North Carolina) R. 239, 264; Brouthin v. Lovelass, Ib. 520; Rose v. King, 4 Hen. & Munf. 157; Lyon v. Tallmadge, supra; Milligan v. Millidge, 3 Cranch, 220. It seems, that in Kentucky a bill will be dismissed for want of parties; although it will be done without prejudice. Barry v. Rogers, 3 Bibb, 314; Foster v. Hunt, Ib. 33; Caldwell v. Hawkins, 1 Litt. 214. If a demurrer is overruled, the complainant may, within ten days thereafter, amend his bill of course and without costs. 43 Rule N. Y. Chancery.]

that a bill, which, if all the parts of the case were disclosed, would be open to a demurrer, is so artfully drawn as to avoid showing upon the face of it any cause of demurrer. In this case the defendant is compelled to resort to a plea, by which he may allege matter which, if it appeared on the face of the bill, would be good cause of demurrer. For in many cases what is a good defence by way of plea is also good as a demurrer, if the facts appear sufficiently by the bill (s). And if a demurrer should Plea after a demurrer. be overruled on argument because the facts do not sufficiently appear on the face of the bill, defence may be made by plea, stating the facts necessary to bring the case truly before the court, though it has been said that the court would not permit two dilatories (t). And after a plea overruled, it is said that a demurrer was allowed, bringing before the a plea. court the same question in substance as was agitated in arguing the plea (u). But after a demurrer has second demurbeen overruled, a second demurrer will not be allowed (x); for it would be in effect to rehear the

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(s) See Hetley, 139. But see 3 Atk. 226.

(t) Hudson v. Hudson, in Chan. 23 April, 1734. Reported 1 Sim. & Stu. 512, note; Rowley v. Eccles, 1 Sim. & Stu. 511.

(u) E. India Company v. Campbell, 1 Ves. 246. But it may be doubted whether this case has not been mistaken by the reporter, and whether the question was not on exceptions to an answer. See 2 Ves. 491, 492, (x) See 2 Bro. C. C. 66; and see above, p. 253, note (l). Where, however, a demurrer was informal in its frame, but good in substance, it was overruled, with liberty to the defendant to file another. See Devonsher v. Newenham, 2 Sch. & Lefr. 199. And, in consequence of the modern dectrine, that a defendant who submits to answer must in general answer fully (1), see below, ch. 2, sect. 2, part 3 [page

⁽¹⁾ By the 38th order of August, 1841, "a defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself

case on the first demurrer; as on argument of a demurrer any cause of demurrer, though not shown in the demurrer as filed, may be alleged at the bar, and if good will support the demurrer (y).

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CHAPTER II.

SECTION II.—PART II.

Of Pleas.

Order of treat. In treating of pleas the same order may be conveniently pursued as has been already used in treating of demurrers. Pleas to original bills will therefore be first considered, and under that head the nature of pleas in general, and the principal grounds

> 306], this court in some instances, on overruling a demurrer to discovery, instead of giving the defendant liberty to insist by answer that he is not bound to make the disclosure required, will give him liberty to file another less extensive. See Thorpe v. Macauley, 5 Madd. 218.

(y) As to demurrers ore tenus, see Pyle v. Price, 6 Ves. 779; 8 Ves. 408; Dummer v. Corporation of Chippenham, 14 Ves. 245; 17 Ves. 216; Att. Gen. v. Moses, 2 Madd. 294; 1 Swanst. 288; Knye v. Moore, 1 Sim. & Stu. 61; Hook v. Dorman, 1 Sim. & Stu. 227 (2).

by demurrer; and that he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer."

(2) Garlick v. Strong, 3 Paige's C. R. 440.

Under a general demurrer for want of equity, a demurrer ore tenus may be made for want of parties. Stillwell v. McNeeley, 1 Green's C. R. 305; 2 Mylne & Craig. 145. A demurrer for want of parties must show who are the proper parties; not indeed by name, for that might be impossible; but in such a manner as to point out to the plaintiff the objection to his bill, and enable him to amend by adding the proper parties. 4 Mylne & Craig. 17.

of plea to every kind of bill, will necessarily be noticed: the distinct pleas applicable peculiarly to the several other kinds of bill will be next mentioned; and in the third place the frame of pleas in general, and the manner in which their validity may be determined, will be considered. Pleas to original bills will also be considered under the two heads of pleas to relief and pleas to discovery only, and these will necessarily involve the consideration of pleas to bills of discovery merely.

A demurrer has been mentioned to be the proper When a plea or answer is nemode of defence to a bill when any objection to it is apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it. When an objection to a bill is not apparent on the bill itself (z), if the defendant means to take advantage of it, he ought to show to the court the matter which creates the objection, either by answer, or by plea which has been described as a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed or barred (a) (1). The defence proper for a plea is such as reduces the cause, or some part of it, to a single point (b),

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cessary.

⁽z) See Billing v. Flight, 1 Madd. (a) Prac. Reg. 324; Wy. Ed. 2 R. 230. Sch. & Lefr. 725; 1 Madd. R. 194. (b) 1 Atk. 54; 15 Ves. 82, 377 (2).

^{(1) [}The correctness of this definition of a plea recognized and illustrated by Lube, p. 238; and see Lord Drogheda v. Malone, Finlay's Digest, 449. Carroll v. Waring, 3 Gill & Johns. 491. As a demurrer collects the negative rule of law from the complainant's own statement, so the plea, on the other hand, deduces the same conclusion from a new statement by the defendant. Lube, 341.]

^{(2) [}Goodrich v. Pendleton, 3 J. C. R. 384. It must be perfect in itself, so that, if true in fact, it will put an end to the cause. Allen v.

and from thence creates a bar to the suit, or to the part to which the plea applies (c) (1). It has been observed, that the end of a plea is to save to the parties the expense of an examination of witnesses at large; and that therefore it is not every good defence in equity that is good as a plea: for that where the defence consists of a variety of circumstances, there is no use of a plea, as the examination must still be at large; and the effect of allowing a plea would be, that the court would give judgment on the circumstances of the case before they were made out by proof (d).

Different kinds. of pleas.

Pleas have been generally considered as of three sorts: to the jurisdiction of the court; to the person of the plaintff or defendant; and in bar of the suit (2). As they have been usually arranged under these heads, it may be convenient to consider them in some degree with reference to that ar-

Randolph, 4 Ib. 693; Lord Drogheda v. Malone, supra. Where a defence consists of a variety of distinct facts and circumstances, there can be no saving by plea. Loud v. Sergeant, 1 Edwards' V. C. Reports, 164.

A plea will be overruled if it does not set forth any new matter, although the objection raised by it would have been valid if it had been urged by way of demurrer. Cozine v. Graham, 2 Paige's C. R. 177.]

⁽c) 2 Bligh, P. C. 614: 54; S. C., 1 Harr. Chan. Prac. 356;

⁽d) Chapman v. Turner, 1 Atk. 2 Bligh, P. C. 614.

⁽¹⁾ The plea must be of some fact which if proved will be a bar to the entire suit, or at least to an entire substantive part of the suit, and in the latter case if it does not go to the whole suit, the defendant must answer or demur to the residue. A defendant may plead to part, answer to part, and demur to part, where his case requires it; but in some form he may meet the whole substance of the bill. Newton v. Thayer, 17 Pick. R. 132, 129.

^{(2) [}Mr. Beames, however, very properly adds a fourth class, which he terms to the bill. Willis, 486, note (a).]

rangment; but the order before observed in treating of demurrers may be at the same time pursued; and pleas may be considered with reference to the several grounds already mentioned on which defence may be made to a bill.

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The objections to the relief sought by an original Pleas to original bills. bill which can be taken advantage of by way of plea, are nearly the same as those which may be the subject of demurrer; but they are rather more numerous, because a demurrer can extend to such only as may appear on the bill itself, whereas a plea proceeds on other matter. The principal are, I. That the subject of the suit is not within the jurisdiction of a court of equity; II. That some other court of equity has the proper jurisdiction; III. That the plaintiff is not entitled to sue by reason of some personal disability; IV. That the plaintiff is not the person he pretends to be, or does not sustain the character he assumes; V. That the plaintiff has no interest in the subject, or no right to institute a suit concerning it; VI. That he has no right to call on the defendant concerning it; VII. That the defendant is not the person he is alleged to be, or does not sustain the character he is alleged to bear; VIII. That the defendant has not that interest in the subject which can make him liable to the demands of the plaintiff; IX. That for some reason, founded on the substance of the case, the plaintiff is not entitled to the relief he prays; [X. That the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the

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court to assert his right] (1). Of these, the second is the plea generally termed a plea to the jurisdiction of the court; and the third, the fourth, and the seventh, are treated as pleas to the person of the plaintiff and defendant; the others are considered as pleas in bar of the suit. XI. The deficiency of a bill to answer the purposes of complete justice may also be shown by plea, which may be considered as in bar of the suit, though perhaps a temporary bar only. XII. The impropriety of unnecessarily multiplying suits may be the subject of plea, which is also in bar of the suit: but the inconvenience which may arise from confounding distinct matters in the same bill, as it must be apparent on the bill itself, unless very artfully framed, can in general only be alleged by demurrer.

Pleas to the jurisdiction.

Those pleas which are commonly termed pleas to the jurisdiction of the court, do not dispute the rights of the plaintiff in the subject of the suit, or that they are fit objects of the cognizance of a court of equity, but simply assert that the court of chancery is not the proper court to take cognizance of Pleas to the per- those rights. Pleas to the person of the plaintiff also do not dispute the validity of the rights which are made the subject of the suit, but object to the plaintiff that he is by law disabled to sue in a court of justice, or cannot institute a suit alone; or that he is not the person he pretends to be, or does not sustain the character he assumes. Pleas in bar are commonly described as allegations of foreign

Pleas in bar.

⁽¹⁾ The passage within the brackets is inserted, and the following numerals are altered from X. and XI. to XI. and XII., in order to make this part agree with what occurs at original pages [274] and [280].

matter, whereby, supposing the bill, so far as it is not contradicted by the plea (e) to be true, yet the suit, or the part of it to which the plea extends, is barred (f). But this description perhaps does not comprise every kind of plea, or does not mark the distinctions between the different kinds with sufficient accuracy.

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I. The general objects of the jurisdiction of a risdiction. It want of court of equity, and the manner in which a want of jurisdiction may be alleged by demurrer, when a bill does not propose to attain any of those objects, or it is apparent on the face of it that none can be attained by it, have been already mentioned. A case which is not really such as will give a court of equity jurisdiction cannot easily be so disguised in a bill as to avoid a demurrer; but there may be instances to the contrary; and in such cases it

(e) 2 Atk. 51.

(f) Prac. Reg. 327, Wy. Ed; 1 Madd. R. 194(1).

The general rule of the court of chancery is: matters in abatement and to the jurisdiction, being preliminary in their nature, must be taken advantage of by plea; and cannot in a general answer which necessarily admits the right and capacity of the party to sue. Livingston v.

Story, 11 Peters, 393, 351.

A plea to the jurisdiction, as the allegement of plaintiff, is a plea in abatement for a general answer, admits the competency of the court to entertain the suit, but if the objection is apparent on the record the court will dismiss it whether parties will consent or not. It is a great mistake to suppose if parties do not object to a matter, the court are bound to entertain cognizance of it and decide it. Wood v. Mann, 1 Sumner R. 580, et seq. 578.

^{(1) [}The rules which have been adopted in England in relation to pleas in bar to bills in equity, when resorted to by defendants, are considered as applicable in the equity courts of Maryland. Chase v. M. Donald, 7 Harris & Johnson, 160. A plea in bar to a bill in equity, denying part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea. Milligan v. Milledge, 3 Cranch, 220.]

should seem a plea of the matter necessary to show that the court has not jurisdiction of the subject, though perhaps unavoidably in some degree a negative plea, would hold (g). Thus, if the jurisdiction was attempted to be founded on the loss of an instrument, where, if the defect arising from the supposed accident had not happened, the courts of ordinary jurisdiction could completely decide upon the subject, perhaps a plea, showing the existence of the instrument, and that it was in the power of the plaintiff to obtain a production of it, ought to be allowed, though instances of this sort of plea may not occur in practice. For it seems highly unreasonable that a plaintiff, by alleging a falsehood in his bill, should be permitted to involve a defendant in the expense of a suit in equity, though the bill may finally be dismissed at the hearing of the cause, if the defendant answers the case made by it, and enters into his defence at large. authority, however, occurs to support such a plea (h); and as there is little disposition in the courts of equity to countenance those defences which tend to prevent the progress of a suit to a hearing in the ordinary way, whatever the expense of the proceeding may be, it would hardly be prudent to endeavor thus to put a stop to an attempt to transfer the jurisdiction of a suit from the ordinary courts to a court of equity; and indeed the guard put upon cases of this kind, by requiring the affidavit of the plaintiff of the truth of the matter which he alleges by his bill to support the jurisdiction of the court, is likely to prevent any abuse upon this head.

(g) See Armitage v. Wadsworth, (h) See 1 Madd. R. 195.

1 Madd. R. 189.

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II. Though the subject of a suit may be within the jurisdiction of a court of equity, yet if the court proper jurisdiction. of chancery is not the proper jurisdiction, the defendant may plead the matter which deprives the court of jurisdiction, and show to what court the jurisdiction belongs (i), and upon this ground may demand the judgment of the court whether he shall be compelled to answer the bill (k) (1). Pleas of this nature arise principally where the suit is for land within a county palatine (1) (2), or where the defendant claims the privileges of an university (m), or other particular jurisdiction (n).

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The court of chancery being a superior court of general jurisdiction, nothing shall be intended to be out of its jurisdiction which is not shown to be so (o) (3). It is requisite, therefore, in a plea to the jurisdiction of the court, to allege that the court

Athol, 1 Ves. 202; Nabob of the matters local. Nels. Rep. 37, 66. See Carnatic v. E. I. Comp., 1 Ves. Jun. also Willoughby v. Brearton, Cary's 371; S. C. 3 Bro. C. C. 292.

(k) Ch. Prac. 417, 420; 3 Atk. Rep. 278.

Chan. Prac. 420; Edgworth v. Davies, 1 Ca. in Cha. 40. Reported, upon view of precedents, that the jurisdiction of the counties palatine was allowed, between parties dwelling with-

(i) Earl of Derby v. Duke of in the same, and for lands there, and Rep. 60; Gerrard v. Stanley, 1 Cha.

. (m) Temple v. Foster, Cary Rep. (1) Com. Dig. Chan. Plea 1. 1 65; Cotton v. Manering, Cary Rep. 73 ; Draper v. Crowther, 2 Vent. 362 ; Stephens v. Berry 1 Vern. 212.

> (n) See Cunningham v. Wegg, 2 Bro. C. C. 241.

(o) 1 Ves. 204; 2 Ves. 357.

⁽¹⁾ As to plea to jurisdiction of a state court by foreign consul or public minister, and the doctrine of their exemption from suit in state courts, see Davis v. Packard and others, (on mandate from the Supreme Court of the United States upon reversal of a decision of the Court of Errors of New-York,) 10 Wend. R. 53, et seq. 74, 50.

⁽²⁾ See note, page 6.

⁽³⁾ The mere fact that a case is in conformity with the principles of natural equity and justice, is not sufficient to bring it within the jurisdiction of a court of equity. There are many principles of natural equity and justice which are not attempted to be enforced therein. Howe v. Sheppard, 2 Sumner's C. C. R. 409.

has not jurisdiction of the subject, and to show by what means it is deprived of jurisdiction (p). is likewise necessary to show what court has jurisdiction (q). If the plea does not properly set forth these particulars (r) it is bad in point of form (s). In point of substance it is necessary, to entitle the particular jurisdiction to exclusive cognizance of the suit, that it should be able to give complete remedy (t). A plea, therefore, of privilege of the university of Oxford, to a bill for a specific performance of an agreement touching lands in Middlesex, was overruled; for the university court could not give complete relief (u). if a suit is instituted against different persons, some of whom have privilege, and some not (x); or if one defendant is not amenable to the particular jurisdiction (y), a plea will not hold. If, likewise, there is a particular jurisdiction, and yet the parties to litigate any question are both resident within the jurisdiction of the court of chancery; as upon a bill concerning a mortgage of the island of Sarke, both mortgagor and mortgagee residing in England, the court of chancery will hold jurisdiction of the cause: for a court of equity agit in perso-

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⁽p) See 3 Bro. C. C. 301; 1 Ves. Jun. 388.

⁽q) Strode v. Little, 1 Vern. 59; Earl of Derby v. Duke of Athol, 1 Ves. 202; S. C. Dick. 129.

⁽r) See Moor v. Somerset, Nels. Rep. 51; and see 9 Mod. R. 95.

⁽s) Foster v. Vassall, 3 Atk. 587. And see Nabob of Arcot v. East Ind. Comp. 3 Bro. C. C. 292; S. C. 1 Ves. Jun. 371.

⁽t) Newdigate v. Johnson, 2 Cain Cha. 170; Wilkins v. Chalcroft, 22 Vin. Abr. 10; Green v. Rutherforth, 1 Ves. 463.

⁽u) Draper v. Crowther, 2 Ventr. 362; Stephens v. Berry, 1 Vern. 212.

⁽x) Lowgher v. Lowgher, Cary's Rep. 55; S. C. 22 Vin. Abr. 9; Fanshaw v. Fanshaw, 1 Vern. 246.

⁽y) Grigg's ease, Hutton, 59; and see 4 Inst. 213; Hilton v. Lawson, Cary's R. 48.

nam(z). So where the court may not have jurisdiction to give relief, it may yet entertain a bill for a discovery in aid of the court which can give relief, if the same discovery cannot be there obtained; as if the jurisdiction be in the king in council, where the defendant cannot be compelled to answer upon oath (a).

Similar to a plea to the jurisdiction is the case of a plea to an information charging an undue election of a fellow of a college in one of the universities, "that by the statutes the visitor of the college ought " to determine all controversies concerning elec-"tions of fellows, and that such controversies ought "not to be determined elsewhere (b)." But the extent of the visitor's authority must be averred, and it must also be averred that he is able to do complete justice (c). And where there is a trust created, the visitor having no power to compel performance of the trust, relief must be had in the king's courts of general jurisdiction (d).

III. In respect to the person of the plaintiff, it III. Disability of may be shown that he is disabled to sue, as being, 1, outlawed; or 2, excommunicated; or 3, a popish recusant convict; or 4, attainted in a premunire, or of treason or felony; or 5, an alien; or it may be shown, 6, that the plaintiff is incapable of instituting a suit alone. A plea of this kind is in the nature of a plea in abatement of the suit.

(c) 1 Ves. 474.

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⁽z) Toller v. Carteret, 2 Vern. 494; 1 Ves. 204; 3 Ves. 182; 5 Madd. 307. (a) 1 Ves. 205.

⁽b) Att. Gen. v. Talbot, 3 Atk. 662; S. C. I Ves. 78. And see I Ves. Berkhamstead School, 2 Ves. & B. 472, 474, 475; 2 Ves. 328.

⁽d) Green v. Rutherforth, 1 Ves. 462; and see 4 Bro. C. C. 167; 2 Ves. Jun. 47; 13 Ves. 533; Ex parte 134.

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1. Outlawry.

1. A person outlawed is disabled from suing in a court of justice, and if a bill is filed in his name the defendant may plead the outlawry, which, whilst it remains in force, will delay the proceeding (e). The record of the outlawry, or the capias thereupon, must be pleaded sub pede sigilli, and is usually annexed to the plea (f)(1). A plea of outlawry, in a suit for the same duty or thing for which relief is sought by the bill, is insufficient according to the rule of law, and shall be disallowed of course, as put in for delay (g). Otherwise a plea of outlawry is always a good plea, so long as the outlawry remains in force (h); but if that shall be reversed, the plaintiff, upon payment of costs, may sue out fresh process against the defendant, and compel him to answer the bill (i). Outlawry in a plaintiff, executor or administrator, cannot be pleaded; for he sues in auter droit (k). It is

(e) A plea of outlawry may be filed without oath, I Ca. in Cha. 258; Took v. Took, 2 Vern. 198; Anon. 2 Freem. 143, Hovend. Ed.: but see Parrot v. Bowden, ib. 37, the main fact appearing upon record, Ord. in Cha. Ed. Bea. 23; 2 Ves. & Bea. 357; and a mere averment of identity being considered sufficient, 2 Vern, 199; and see 19 Ves. 83. And such a plea may be filed by a defendant who is in contempt. Waters v. Chambers, 1 Sim. & Stu. 225.

(f) Tothill, 54; Prac. Reg. 327, Wy. Ed.; Ord. in Cha. Ed. Bea. 27. And in a case in which the formality

alluded to had been omitted, by mistake of the clerk of the outlawries, the plea was allowed to be amended, by annexing to it an office-copy of the exigent, or record of the outlawry. Waters v. Mayhew, 1 Sim. & Stu. 220.

(g) See Philips v. Gibbons, 1 Ves. & Bea. 184; Ord. in Cha. Ed. Bea. 175.

(h) Or. in Cha. Ed. Bea. 175; 3 Bac. Abr. 761, Outlawry (3).

(i) Ord. in Cha. Ed. Bea. 175; and see Peyton v. Agliffe, 2 Vern. 312.

(k) Killigrew v. Killigrew, 1 Vern. 184; Prac. Reg. 326, Wy. Ed.

^{(1) [}See the form of such a plea, Willis, 503. Outlawry can take place in the State of New-York only upon a conviction for treason. 2 Revised Statutes, 553, 745.]

equally insufficient if alleged in disability of a person named in a bill as the next friend of an infant plaintiff (l), or in an information as a relator (m).

2. The defendant may plead that the plaintiff is 2. Excommunication. excommunicated (n) (1), which must be certified by the ordinary, either by letters patent containing a positive affirmation that the plaintiff stands excommunicated, and for what; or by letters testimonial, reciting, "quod scrutatis registeriis invenitur," &c. Either of these certificates must be sub sigillo, and so pleaded (o). Excommunication is a good plea to an executor or administrator, though they sue in auter droit (p), but not to the next friend of an infant (q). This, like the plea of outlawry, ceases to be a bar when the disability is removed; and therefore the plaintiff, purchasing letters of absolution, may, as at law, sue out fresh process, and compel the defendant to answer the bill (r).

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3. By statute 3 Ja. I. c. 5, s. 11, every popish 3. Popery

(l) Prac. Reg, 327, Wy. Ed.

(m) There is a case, Att. Gen. v. Heath, Prec. in Cha. 13, where a plea of outlawry, in disability of the person of a relator, is said to have been allowed in the duchy-court of Lancaster. But the relator seems to have sustained the character of plaintiff as well as of relator. See 3 Bac. Abr. 762, Outlawry (3); and see also Waller v. Hanger, 2 Bulstr. 134; Palmer's case, And. 30.

(n) And this plea may be put in without oath, if the excommunication appear upon record. Ord. in Cha. Ed. Bea. 26, and 2 Ves. & Bea. 327.

(o) Ord. in Cha. Ed. Bea. 27; Prac. Reg. 327, Wy. Ed. Tothill, 54.

(p) Co. Litt. 134, a.; 2 Bac. Abr. 319; Excom. (D).

(q) Prac. Reg. 278.

(r) Amers v. Legg, Choice Ca. in Cha, 164; Prac. Reg. 327, Wy. Ed. It should here be mentioned, that by stat. 53 Geo. III. c. 127, excommunication is discontinued, except in certain cases therein specified.

⁽¹⁾ This disability has been removed by the stat. 53 Geo. III. c. 127, s. 3.

recusant convict is in many cases disabled to sue (1), in the same manner as a person excommunicated. The instances of a plea of conviction of recusancy have probably been rare, as no traces of any occur in the books of reports, nor does the form of the plea appear in the books of practice. If advantage should be attempted to be taken of this statute, the court would probably require the same averments to support the plea as are necessary to a plea of the same nature at law (s). This plea also ceases to be a bar if the plaintiff by conforming removes the disability (t).

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4, Attainder. [229]

4. A plea, that the plaintiff is disabled from suing being attainted, is equally rare (u). It would probably be likewise judged with the same strictness as if it was a plea at law (x).

5. Alienage.

5. There is little more to be found in the books upon the subject of a plea that the plaintiff is an alien (y) (2). An alien, who is not an alien enemy,

See Lord Petre v. Univ. of Cambridge, Lutwyche, 1100.

(t) See stat. 31 Geo. III. c. 32, s. 3, and valuable note to Co. Litt. p. 391, a. note (2). Hargr. & Butl. Ed.

(u) See _____ v. Davies, 19 Ves. 81; and see Ex parte Bullock, 14 Ves. 452. And case on Irish statutes, Kennedy v. Daly, 1 Sch. & Lefr. 355.

(x) 2 Atk. 399. This kind of plea is not to be supported by oath, but

(s) 3 Bac. Abr. 780. Papists, (1). can be proved by the record alone. v. Davies, 19 Ves. 81; 2 Ves. & Bea. 327.

> (y) Burk v. Brown, 2 Atk. 397; 2 Vin. Abr. 274, Alien (1); 1 Bac. Abr. 83, Alien (D); Prac. Reg. 327, Wy. Ed.; Rast. Entr. 252; Bolt v. Att. Gen. 1 Bro. P. C. 421, Toml. Ed.; Albretcht v. Sussman, 2 Ves. & Bea. 323; and see Ex parte Lee, 13 Ves. 64; and Ex parte Boussmaker, 13 Ves. 71.

⁽¹⁾ This disability has been removed by the stat. 31 Geo. III. c. 32.

^{(2) [}See the form of a plea that the complainant is an alien enemy. Willis, 513; 2 Equity Draft. 94, (2d edit.); and the form of the one which was used in Albretcht v. Sussman, (supra.) Beames on Pleas, 329.]

is under no disability of suing for any personal demand (y); and an alien enemy may sue under some circumstances (z). A plea has been put in to a bill filed by an alien infidel not of the Christian faith, and was attempted to be supported upon the ground that the plaintiff was upon a cross-bill incapable of being examined upon oath. The plea was overruled without argument (a).

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6. If a bill is filed in the name of any person in- verture, idiotey, capable alone of instituting a suit, as an infant (1), a married woman (2), or an idiot or lunatic (3), so found by inquisition, the defendant may plead the infancy, the coverture (b), or the inquisition of idiotcy or lunacy (c), in abatement of the suit.

or lunacy

IV. A plea that the plaintiff is not the person plaintiff is not the person he person he he pretends to be, or does not sustain the character pretends to be, he assumes, and therefore is not entitled to sue as tain the characsuch (d), though a negative plea, is good in abate-

- (y) Ramkissenseat v. Barker, 1 Atk. 51: As to the incapacities of aliens to take and to hold certain property, see Co. Litt. 2, b., and notes in Hargr. & Butl. Ed. In such cases, it is presumed that a plea of mere alienage, if properly framed, would be a sufficient defence. See Co. Litt. 129 (b); and Burk v. Brown, 2 Atk.
- (z) 3 Burr. 1741; 1 Bac. Ab. 84, Alien (D); Doug. 619; Cornu and Blackburne, and the case of Anthon

and Fisher, in Doug. note 1, p. 626. But the latter case was afterwards reversed in the Exchequer Chamber, 16th Nov. 1784. And see Evans v. Richardson, 3 Meriv. 469.

- (a) Ramkissenseat v. Barker, 1 Atk. 51.
 - (b) Prac. Reg. 326, Wy. Ed.
- (c) See case of the plaintiff being in a state of mere mental incapacity, Wartnaby v. Wartnaby, 1 Jac. R. 377.
 - (d) Prac. Reg. 326, Wy. Ed.

^{(1) [}See the form of a plea of infancy to a bill exhibited without a next friend, Willis, 514.]

^{(2) [}See the form of a plea of cover ure of the complainant, Willis, 515.

^{(3) [}See the form of a plea of Iunacy, Willis, 516.]

ment of the suit; as where a plaintiff entitled himself as administrator, (1) and the defendant pleaded that he was not administrator (e). And where a plaintiff entitled himself as administrator of an intestate, and the defendant pleaded that the supposed intestate was living (f), the plea was allowed (2). It has been made a question how far a negative plea can be good (g). To a bill by a person claiming as heir to a person dead, the defendant pleaded that another person was heir, and that the plaintiff was not heir to the deceased, and the plea was overruled (h), but this decision was

(e) Winn v. Fletcher, 1 Vern. 473; in the next page (3). but see Fell v. Lutwidge, 2Atk. 120; 3 Barnard, 320.

(f) Ord v. Huddleston, Dick. 510; S. C. cited Cox, R. 198.

(g) But that question has been set at rest. 11 Ves. 302, 305. See instances of negative pleas referred to

(h) Newman v. Wallis, 2 Bro. C. C. 142; and see Gunn v. Prior, Dick. 657; S. C. 1 Cox, R. 197; Forrest, Ex. R. 88, n. Kinnersly v. Simpson, Forrest, 85. See also Earl of Strathmore v. Countess of Strathmore, 2 Jac. & W. 541.

(1) Plea that plaintiff is not administrator, he not having taken out letters in the state where he filed his bill, (though he had in another state where he was a citizen,) was held good on general principles. If in former case he take out letters, he might file his bill in the Circuit Court of the United States as a citizen of the latter state in his character as administrator. Carter v. Treadwell, 3 Story R. 42, 50, 25.

[If a complainant sues as executrix, and has not obtained probate, the defendant may raise the objection by plea. Bourke v. Kelly, 1 Hogan, 172; Simons v. Milman, 2 Sim. 241.

The truth of a plea that the complainant is not the executrix of her testator, must be tried under a reference and not a replication. Bourke v. Kelly, supra.

As to swearing to a plea in disability of the person, see Woods v. Creagh, 1 Hogan, 221.]

(2) [See the form of such a plea, Willis, 517. For the form of a plea by several defendants, that the complainants are not next of kin, and averring that only one of the defendants sustains that character. Equity Draft. 104.]

(3. [Also Beames on Pleas, 120 to 129; Warrington v. Mothersill, 7 Price, 666.]

afterwards doubted by the learned judge himself (i), when pressed by the necessary consequence, that any person falsely alleging a title in himself might compel any other person to make any discovery which that title, if true, would enable him to require, however injurious to the person thus improperly brought into court; so that any person might, by alleging a title, however false, sustain a bill in equity against any person for any thing so far as to compel an answer; and thus the title to every estate, the transactions of every commercial house, and even the private transactions of every family, might be exposed; and this might be done in the name of a pauper, at the instigation of others, and for the worst purposes (k) (2). To avoid this in-

(i) 3 Bro. C. C. 489; 1 Madd. R. showing who is heir, would be good, that the plaintiff is not heir, without

194. And it seems to have been for that the defendant might not be established, that in such a case a plea able to prove. 16 Ves. 264, 265 (1).

(k) As further examples of nega-

(1) [And see Beames on Pleas, 123, 124, et seq. and notes there.]

(2) Such a negative as above mentioned is a good plea. And where Necessity for an a plea is in substance a negative plea, though in form it is an affirmative pleaving a plea of plea, it must be accompanied by an answer as to allegations which, it true, no title. would disprove the plea. Thus where the plaintiff claims as heir ex parte materna, and the defendant pleads that another person is heir ex parte paterna, in such case the plea is in substance a plea of no title as heir, an I must be accompanied by the answer as to admissions of the plaintiff's title alleged to have been made by the defendant. Harland v. Emerson, 8 Bligh, (N. S.) 62.

A plea which negatives to plaintiff's title, does not protect the defendant from answer and discovery as to such matters as are specially charged "as evidence," of the plaintiff's title. Sanders v. King, 2 Sim. & Stu. 277. But it does protect him from answer and discovery generally as to the subject of the suit; and indeed as to all matters which the plaintiff does not distinctly inform the defendant are the circumstances by which the plaintiff's title is to be established. Sand:rs v. King, 2 Sim. & Siu. 277; Thring v. Edgar, 2 Sim. &Stu. 274.

Admissions of title, however, form an exception to this. For, in order

convenience, a defendant has in some cases been permitted to negative the plaintiff's title by answer, and thus to protect himself against the required discovery; but in other cases this has not been allowed, and the subject seems still to require further consideration (l).

tive. pleas, see *Drew* v. *Drew*, 2 Ves. & Bea. 159; *Sanders* v. *King*, 6 Madd. 61; and *Yorke* v. *Fry*, ibid. 65; that plaintiff is not a partner (1); and *Thring* v. *Edgar*, 2 Sim. & Stn. 274 (2), and particularly at p. 280, that he is not a creditor.

(l) See 11 Ves. 283, 296 and 303, and the several cases there cited, with the discordant opinions of several judges. In the case of Gethin v. Gale, cited in Ambl. 354, the Master of the Rolls sitting for the Chancellor, 29 Oct. 1739, said, it was one thing to deny a title in the plaintiff,

to obtain an answer as to admissions of title, when in effect a plea of no title is put in, it is not necessary that the plaintiff should allege such admissions "as evidence" of his right or title, or should by any other terms point out that he requires a discovery of them as evidence of his title; because their very nature renders this superfluous. Harland v. Emerson, 8 Bligh, (N. S.) 62.

Plea of title in the defendant, without traversing the plaintiff's title.

Where a plaintiff claims estates, either as heir to the person last seised, or as a remainderman under the limitations of a settlement in the possession of the defendant, under which, as he charges, the person last seised took only a life estate, or under the limitations of some prior settlement in the possession of the defendant, which, as he charges, the person last seised had no power to defeat; and the defendant pleads that the person last seised had an estate tail, and suffered a recovery to the use of himself in fee, and then devised the estates to the defendant, but takes no notice of the settlement particularly mentioned in the bill or of any other settlement, the plea will be overruled; because the defendant ought in such case to traverse the grounds of the plaintiff's title, or some substantial part of it—to deny the existence of such settlement, or at least to deny the fact of his possession or knowledge of the contents thereof. Hungate v. Gascoigne, 1 Russ. & M. 698.

- (1) [To a bill filed by persons claiming title to an estate as the coheirs of A. ex parte materna, the defendants pleaded that another person was the heir of A. ex parte paterna, but did not set forth the pedigree of that person. Semble, that such a plea is good. Emerson v. Harland, 3 Simon's R. 490.]
 - (2) Warrington v. Mothersill, 7 Price, 666.]

V. Interest in the subject of the suit, or a right to the thing demanded, and proper title to institute a suit concerning it, have been mentioned as essen-rest in the plain. tially necessary to sustain a bill; and it has been to suc. observed, that if they are not fully shown by the bill itself, the defendant may demur. But a title apparently good may be stated in a bill, and yet the plaintiff may not really have the title he states (1),

V. Want of intetiff, or of right

been allowed as a good plea.-Mr. sect. 2, part 3. [P. 307.] Capper's note. See the authorities

and another to show a title in one's cited in the last note, and in the notes self; and that the former had never to the next page and below, Chap. II.

(1) If a party having no interest be joined as co-plaintiff with a per- Plea that a coson having an interest, and that fact does not appear on the face of the plaintif is an unbill, but is brought forward by a plea, such a plea is a good defence to bankrupt. the suit. An instance of this kind occurs where an uncertificated bankrupt is made a co-plaintiff. Makepeace v. Haythorne, 4 Russ. 244.

If to a bill filed by the assignee of an insolvent debtor, the defendant pleads that the consent of the creditors and of the Insolvent Debtors sent to a suit by Court to the institution of the suit had not been obtained, the plea will insolvent debbe overruled; because the provision made in the statute as to such consent is made for the benefit of the creditors alone. Casborne v. Barsham, 6 Sim. 317. See also note, p. 180, supra.

Plea of want of

According to the case of Ockleston v. Benson, to a bill by the assignees, or of a bankrupt. of a bankrupt against a debtor, the latter may plead that the suit was not instituted with the consent of the major part in value of the creditors, at a meeting pursuant to the Act of Parliament. 2 S. & S. 265. But see preceding paragraph and note, p. 180, supra.

A plea of no interest will be allowed, where a suit is instituted by Plea of no intetwo persons on behalf of themselves and all other shareholders in a company, but one of the two has sold and assigned his shares before the institution of the suit. Doyle v. Muntz, 10 Jur. 914, V. C. W.

To a bill for dower, a plea of ne unques accouple, that is, a plea that Plea of ne unques accouple, the plaintiff and the person whose widow she claims to be were never lawfully married, is a good plea. Poole v. Poole, 1 Coll. Eq. Ex. 331.

Where administration is granted under the impression that the deceased died intestate, and then the executor files a bill to recover part of the assets, alleging that he has proved the will, a plea of no probate having been granted will be allowed. For until probate is obtained, it is not certain but that the administration is valid. Somon v. Milman, 2 Sim. 241.

Plea of no progranted

either because he misrepresents himself, which has been considered under the last head, or because he suppresses some circumstances respecting his title, which if disclosed would show either that nothing was ever vested in him, or that the title which he had has been transferred to another; and this the defendant may show by plea in bar of the suit. As if a plaintiff claims as a purchaser of a real estate, and the defendant pleads that he was a papist, and incapable of taking by purchase (m) (1); or a plaintiff claims property under a title accrued previous to conviction of himself, or of a person under whom he claims, of some offence which occasioned a forfeiture (n), or previous to a bankruptcy (o) (2), or any other defect in the title (p) of the plaintiff to the matter claimed by the bill. A plea of conviction of any offence which occasions forfeiture, as manslaughter, must be pleaded with equal strictness as a plea of the same nature at

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(m) See, however, 18 Geo. III. c. 60, s. 2; and the 43 Geo. III. c. 30, by which this incapacity is conditionally removed.

(n) 2 Atk. 399; — v. Davies, 19 Ves. 81.

(o) Carleton v. Leighton, 3 Meriv. 667. See Lowndes v. Taylor, 1 Madd. R. 423; S. C. 2 Rose R. 365, 432. It seems a plea of the plaintiff's bankruptcy must be upon oath. Joseph v. Tuckey, 2 Cox R. 44. See

instance of a plea that the plaintiff had taken the benefit of an act for the relief of insolvent debtors, *De Minckwitz* v. *Udney*, 16 Ves. 466.

(p) Quilter v. Mussendine, Gilb. Ca. in Eq. 228; Hitchins v. Lander, Coop. R. 34; Gait v. Osbaldeston, 1 Russ. R. 158, in which the decision in S. C. reported 5 Madd. 428, was overruled; and see Ocklestone v. Benson, 2 Sim. & Stu. 265.

⁽¹⁾ This incapacity has been abolished by the stat. 10 Geo. IV. c. 7, s. 23.

^{(2) [}See the form of a plea of bankruptcy of the complainant, Willis, 519. A plea that the complainant has taken the benefit of an act for the relief of insolvent debtors, is to be found in *De Minckwitz* v. *Udney*, 16 Ves. 467.]

common law (q). But if a plea goes to show that no title was ever vested in the plaintiff, though for that purpose it states an offence committed, conviction of the offence is not essential to the plea, and the same strictness is not required as in a case Thus, in the exchequer, to a bill seekof forfeiture. ing a discovery of the owners of a ship captured, and payment of ransom, the defendants pleaded that the captor was a natural-born subject, and the capture an act of piracy. Though the barons at first thought that the plea could not be supported unless the plaintiff had been convicted of piracy, and the record of the conviction had been annexed to the plea, they were finally of opinion that as the plea showed that the capture was not legal, and that therefore no title had ever been in the plaintiff, the plea was good, and they allowed it accordingly(r). Pleas of want of title generally extend to discovery as well as to relief (s).

It cannot often be necessary to make defence on this ground by way of plea; for if facts are not stated in the bill from which the court will infer a title in the plaintiff, though the bill does contain an assertion that the plaintiff has a title, the defendant may demur; the averment of title in the bill being not of a fact, but of the consequence of facts. Thus, where a plaintiff stated an incumbrance on a real estate, of which he was devisee, and averred that it was the debt of the testator, and prayed that it might be paid out of the testator's personal estate in case of the real estate devised, the de-

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⁽q) 2 Atk. 399.

⁽s) Gilb. 229.

^{. (}r) Fall v. ---, 1st May, 1782.

fendant having pleaded that the testator had done no act by which he made it his own debt, the plea was overruled, because, whether it was his debt or not was matter of inference from the facts stated in the bill, and therefore the proper defence was by demurrer (t). Accordingly the defendant afterwards demurred, and the demurrer was allowed (u).

VI. Want of priplaintiff and de-fendant. vity between the

VI. In treating of demurrers notice has been taken that though a plaintiff has an interest in the subject of a suit, and a right to institute a suit concerning it, yet he may have no right to call upon the defendant to answer his demands; and it has been observed, that this happens where there is a want of privity of title between the plaintiff and defendant (x). It would probably be difficult to frame a bilt which was really liable to objection on this head so artfully as to avoid a demurrer. if such a bill could be framed it should seem that defence might be made by plea.

VII. That the defendant is not the person he is alleged to be, or does not sustain the character which he is alleged to bear. 276

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VII. A plea that the defendant is not the person he is alleged to be, or does not sustain the character which he is alleged to bear, is mentioned as a plea which may be supported (y). It seems to have been considered as more convenient for a defendant under these circumstances to put in an answer alleging the mistake in the bill, and praying the judgment of the court whether he should be com-

R. 334.

May, 1784, in Charcery.

⁽u) Same cause, 18th July, 1786.

⁽x) See above, p. 184. [And see

⁽t) Tweddell v. Tweddell, 25th Carroll v. Waring, 3 Gill & Johnson, 491.]

⁽y) Prac. Reg. 326; Wy. Ed. And see Griffith v. Bateman: Finch

pelled further to answer the bill (y), but this in fact amounts to a plea, though it may not bear the title; and a plea has been considered as the proper defence (z) (1).

VIII. If a defendant has not that interest in the VIII. Want of subject of a suit which can make him liable to the defendant. demands of the plaintiff (2), and the bill alleging that he has or claims an interest avoids a demurrer, he may plead the matter necessary to show that he has no interest (a), if the case is not such that by a general disclaimer he can satisfy the suit (b). Thus, where a witness to a will was made a defendant to a bill brought by the heir at law to discover the circumstances attending the execution, and the bill contained a charge of pretence of interest by the defendant, though a demurrer for want of interest was overruled because it admitted the truth of the charge to the contrary in the bill, yet the court declared an opinion that a defence might have been made by a plea (c).

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IX. Though the subject of a suit may be within

(4) Cary Rep. 61; Prac. Reg. 327, p. 294, note. Wy. Ed; Att. Gen. v. Lord Hotham, 1 Turn. R. 209. See below, Chap. II. sect. 2, part 3.

(z) 1 Ves. Jun. 292, and see ibid.

(a) Plummer v. May, 1 Ves. 426.

(b) See the case of Turner v. Robinson, 1 Sim. & Stu. 3.

(c) Plummer v. May, 1 Ves. 426.

⁽¹⁾ Where a creditor of a testator files a bill stating that the defen- Plea that the dedant is the executor, and had proved the will, and that he sets up a vol- executor. untary assignment made by the testator to him; and charging that whether he has proved the will or not, he has taken possession of the personal estate, and is accountable for the same; and praying that the deed may be declared to be void, and that an account may be taken of the personal estate come to the hands of the defendant; a plea that the defendant is not executor is a good plea to the whole bill. Hill v. Neale, 5 Law J. (O. S.) 144, V. C.

⁽²⁾ A plea of a defective title by a vendor to a bill filed by a pur- Plea of a bad title by a vendor. chaser for a specific performance is bad. Thomas v. Dering, 4 Law J. (N. S.) 149, V. R.

236] IX. Want of title to the relief prayed.

the jurisdiction of a court of equity, and the court of chancery may have the proper jurisdiction; though the plaintiff may be under no personal disability, and may be the person he pretends to be, and have a claim of interest in the subject, and a right to call on the defendant concerning it, and the defendant may be the person he is stated to be, and may claim an interest in the subject which may make him liable to the plaintiff's demands, with respect to which circumstances pleas have been already considered, still the plaintiff, by reason of some additional circumstance, may not be entitled in the whole or in part to the relief or assistance which he prays by his bill. The objections which may be made to the whole or any part of a suit, though liable to none of the objections before considered, are principally the subject of those kinds of pleas which are commonly termed pleas in bar; and which are usually ranked under the heads of pleas of matter recorded, or as of record, in the court itself, or some other court of equity; pleas of matters of record, or matters in the nature of matters of record, in some court not a court of equity: and pleas of matters in pais.

Division of pleas in bar. 278

Pleas in bar of matters recorded, or as of record, Pleas of matters in the court itself, or some other court of equity, may be, 1, A decree or order of the court by which the rights of the parties have been determined (d)(1),

recorded or as of record in the court itself, or in some other court of equity.

> This must have been a negative plea. 550; Turner v. Robinson, 1 Sim. & And see Cartwright v. Hately, 3 Stu. 3. Bro. C. C. 238; S. C. 1 Ves. Jun. (d) 3 Atk. 626. 292; 7 Ves. 289, 290; 1 Ves. & Bea.

^{(1) [}See the form of a plea of a decree, Willis, 529.] The settled law of all courts is, that as a general rule, a fact that has been directly tried and decided by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court.

or another bill for the same cause dismissed (e) (1); 2. Another suit depending in the court, or in some other court of equity, between the same parties for the same cause (f) (3). Pleas of this nature

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(e) Pritman v. Pritman, 1 Vern. (f) Foster v. Vassall, 3 Atk. 587. 310; 1 Atk. 571.

Hence a verdict or judgment of a court of record or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided, between the parties to such suit. In this there is and ought to be no difference between a verdict and judgment in a court of common law and decree in equity. They both stand on the same footing. Bank of U. S. v. Beverley, 1 Howard's R. 148-9, 134. A prior decree must be pleaded or relied on and set forth in answer, showing the same points in issue, or that the rights now set up have been conclusively determined, and hence in support of a plea of former decree it is necessary to set forth so much of the first bill and answer as will show the same point was then in issue. Lockwood et al. v. Wildman et al., 13 Ohio R. 450-1, 430.

The doctrine in Aspden v. Nixon, 4 Howard, 467, 497, is, that the decree or judgment must have been, 1. by a court of competent jurisdiction upon the same subject matter; 2. between the same parties; 3. for the same purpose.

In Matthews v. Roberts, 1 Green's C. R. 340-1, 338, held, that a former decree need not appear as between the same parties if for the same subject matter. But if not for the same subject matter one can be no bar to the other. But if the defendant has a substantial defence, which cannot avail him from the inaccurate manner in which his plea is drawn, he may claim the full benefit of it by answer, and on overruling the plea with costs, time will be allowed to answer. Ibid.

- (1) The judicial power is incompetent to revise the evidence on which the decree [of dismission] was rendered, on any ground other than that set up in the answer, or apparent on the present record, and they must be taken to be (as now set up in answer, or apparent on the present record) beyond all controversy in this or any future case between the parties. Bank of U. S. v. Beverly, 1 Howard's R. 148-9, 134.
- (2) [Saunders v. Frost, 5 Pickering's R. 275. See the form of such a plea, Willis, 534.] See p. 287, infra.

But if the judgment of a court of competent jurisdiction is reversed, the party is not precluded from a new action. The mere reversal of a decree has not the legal efficacy of a subsisting decree on the merits. A reversal with few exceptions affirms nothing but its own correctness. It simply nullifies the former judgment or decree. It decides nothing upon the rights of parties, but confines itself to the adjudication that what has been done shall have no legal effect. Thus where the decree

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generally go both to the discovery sought and the relief prayed by the bill.

1. Plea of a decree signed and enrolled. A decree (1), determining the rights of the parties, and signed and enrolled, may be pleaded to a new bill for the same matter (g), and this even if the party bringing the new bill was an infant at the time of the former decree (h): for a decree enrolled can only be altered upon a bill of review (i). But the decree must be in its nature final, or afterwards made so by order, or it will not be a bar (k) (2). Therefore a decree for an account of principal and interest due on a mortgage, and for a foreclosure in case of non-payment, cannot be pleaded to a bill to redeem unless there is a final order of foreclosure (l); nor can a decree which has

(g) Rutland v. Brett, Finch R. 124; Mallock v. Galton, Dick. 65.

(i) 3 Atk. 627. See above, p. 101, et seq.

(h) I Atk. 631; Gregory v. Molesworth, 3 Atk. 626; 3 Ves. 317.

(k) See page 280, notes (o) and (p).

526; 3 Ves. 317. (p)

(1) Senhouse v. Earl, 2 Ves. 450.

of the Supreme Court of probate in Massachusetts reversed that of the inferior court decreeing distribution, such reversal was held no bar to a subsequent suit by the parties claiming as heirs or legal representatives. A fortiori, it was no bar to a bill in equity. Harvey v. Richards, 2 Gall. 216, 229, 230.

Plea of a former

- (1) A plea to a creditor's bill, of a decree obtained by other creditors in a former suit will be overruled, where that decree is less beneficial to the plaintiffs in the second suit than the decree they might obtain in such second suit. Pickford v. Hunter, 5 Sim. 122.
- (2) [Although a decree cannot be pleaded in bar if it is not enrolled, yet, in such a case, it may be insisted on by way of answer. Davoue v. Fanning, 4 J. C. R. 199. It will not be allowed on the hearing, unless set up in the answer, or (if enrolled) pleaded. Lyon v. Tallmadge, on appeal, 14 J. R. 501.] In New-York the enrolled decree must be signed by the chancellor or vice-chancellor, and also by the register or clerk, before it can be filed so as to authorize the issuing of an execution thereon; and it is irregular to file it without such signatures. Bank of Rochester v. Emerson, 10 Paige's Ch. R. 359.

Where the decree gives all t'e consequential directions, so as finally to dispose of the whole case upon the coming in and confirmation of the

been made upon default of the defendant in not appearing at the hearing be pleaded without an order making the decree absolute; the terms of such a decree being always that it shall be binding on the defendant, unless, on being served with a writ of subpœna for the purpose, he shall show cause to the contrary (m). Upon a plea of this nature so much of the former bill and answer must be set forth as is necessary to show that the same point was then in issue (n). A decree of order dismissing a former bill for the same matter may be pleaded in bar to a new bill (o) (1) if the dismission was upon hearing, and was not in terms directed to be without prejudice (p). But an order of dismission is a bar only where the court determined that the plaintiff had no title to the relief sought by his bill; and therefore an order dismissing a bill for want of prosecution is not a bar to another bill (q). And a decree cannot be pleaded in bar

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And see Halsey v. Smith, Mos. 186; P. C. 1, Toml. Ed. Venemore v. Venemore, Dick. 93.

But see 1 Vern. 310.

(o) Pritman v. Pritman, 1 Vern. v. Remsen, 7 Ib. 286.] 310; Madge v. Brett, Finch. R. 46; Connell v. Warren, ib. 239; Earl of 14 Ves. 232.

(m) Ord. in Cha. 198; Ed. Bea. Peterborough v. Germaine, 6 Bro.

(p) Seymour v. Nosworthy, 1 Ca. (n) Child v. Gibson, 2 Atk. 603. in Cha. 155; Toth. 50. [S. P. Perine v. Dunn, 4 J. C. R. 140; Holmes

(q) Brandlyn v. Ord, 1 Atk. 571;

master's report, by a common order in the register's office, without the necessity of bringing the case again before the court for any further decree or direction, it is a final and not an interlocutory decree; although further proceedings must be had in the master's office to carry the decree of the court into effect. Quackenbush v. Leonard, 10 Paige's Ch. R. 131.

[Lyon v. Tallmadge, on appeal, 14 J. R. 501.]

[It must be an absolute decision upon the same point or matter, and

⁽¹⁾ Where a demurrer by one of the assignees of a bankrupt to a Plea by one asbill a minst the assignees for a general account of their dealings under low mee of a dethe bankruptcy has been allowed, it may be pleaded by the other assig-morrer by another. nee in bar of the suit. Tarleton v. Hornby, 1 Y. & C. Eq. Ex. 333.

of a new bill unless it is conclusive (o) of rights of the plaintiffs in that bill, or of those under whom they claim (p). Therefore a decree against a mortgagor, and order of foreclosure enrolled, were not deemed a bar to a bill by intervening incumbrancers to redeem, although the mortgagee had no notice of those incumbrances; and the mortgagee having been long in possession, the account taken in the former cause was not deemed conclusive against the plaintiffs in the new bill, though under the circumstances the court, on overruling the plea and ordering the defendant to answer, limited the order by directing that the defendant should answer to charges of errors or omissions, but that the plaintiffs should not unravel the account at large before the hearing (q).

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A decree must be signed and enrolled, or it cannot be pleaded in bar of a suit (r), though it may be insisted upon by way of answer (s). But though it cannot be pleaded directly in bar of the suit for want of enrolment, it may perhaps be pleaded, to show that the bill was exhibited contrary to the usual course of the court, and ought not therefore to be proceeded upon (t). For if the decree ap-

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⁽o) See Coysgarne v. Jones, Ambl. 1710, in Ch. reported 2 Vern. 663. 613; Collins v. Gough, 4 Gwill. T. C.

⁽p) See Doyly v. Smith, 2 Ca. in Ch. 119; Godfrey v. Chadwell, 2 Vern. 601; Atkinson v. Turner, 3 Barnard, 74.

⁽q) Morrett v. Western, 15 July,

⁽r) Anon. 3 Atk. 809; Kinsey v. Kinsey, 2 Ves. 577. 4 J. C. R. 199.

⁽s) 2 Ves. 577. And see Charles v. Rowley, 2 Bro. P. C. 485, Toml. Ed. Lyon v. Talmadge, 14 John. R. 501. (t) See 2 Ves. 577, note; Chan. Pleas, 89.

the new bill must be brought by the same complainant who filed the original bill or his representatives, against the same defendant and his representatives. If the defendant in the original suit, having since acquired a legal estate or legal advantage, files his bill against the former complainant, the cause is open on its merits. Neafie v. Neafie, 7 J. C. R. 1.]

peared upon the face of the bill, the defendant might demur (u), a decree not signed and enrolled being to be altered only upon a re-hearing (x), as a decree signed and enrolled can be altered a decree signed and enrolled can be altered whether in a plat to a bill to impeach a docree for fraud, a verments near the fraud at th only upon a bill of review (y).

Whether in a are necessary.

ground of fraud used in obtaining it, which, as has been observed (z), may be done without the previous leave of the court, the decree may be pleaded in bar of the suit, with averments negativing the charges of fraud, supported by an answer fully denying them (a). Whether averments negativing the charges of fraud are necessary to a plea of this description appears to have been a question much agitated in recent cases (b); upon which it may be observed, that without such averments, if the decree

- 809; S. C. 2 Ves. 571; Lady Granville v. Ramsden, Bunbury, 56.
- (x) 2 Ves. 598. See above, pp. 108, 109.
- (y) Read v. Hambey, 1 Ca. in Cha. 44; S. C. 2 Freem. 179. See above, p. 278 note (h).
 - (z) Pages 112, 113.
- (a) Wichalse v. Short, 3 Bro. P. C. 558, Toml. Ed.; S. C. 2 Eq. Ca. Abr. 177, and 7 Vin. Abr. 398, pl. 15; 3 P. Wms. 95; Gilb. For. Rom. 58; Treatise on Frauds, c. 18, p. 220; Butcher v. Cole, at the Rolls, 26 June, 1786, cited 1 Anstr. 99. See

(u) Wortley v. Birkhead, 3 Atk. the cases of Sidney v. Perry, Parkinson v. Lecras, Meadows v. Duchess of Kingston, and Devie v. Chester, mentioned in pages 289, 297, 300, 306, 321. And see 6 Ves. 596; 2 Sch. & Lefr. 727; 5 Madd. 330; 6 Madd. 64 (1).

> (b) Pope v. Bish, 1 Anstr. Exch. R. 59; Edmundson v. Hartley, ib. 97. And see Bayley v. Adams, 6 Ves. Jun. 586. In the cases in the court of exchequer it seems to have been supposed that the answer in support of the plea overruled the plea. But an answer can only overrule a plea where it applies to matter which

^{(1) [}Allen v. Randolph, 4 J. C. R. 693. Where a bill charged misrepresentation, coercion and fraud in procuring the release of a debt, and the defendant put in a plea and answer; and in his plea insisted on the release in bar, without noticing the allegation of fraul, though in the answer it was fully met and denied:-Held, that the plea was bad. Allen v. Rando'ph, sujra.}

were admitted by the bill, nothing would be put in issue by the plea. The question in the cause must be, not whether, such a decree had been made, but whether, such a decree having been made, it ought to operate to bar the plaintiff's demand. To avoid its operation the bill must allege fraud in obtaining it; and to sustain it as a bar the fact of fraud must be denied and put in issue by the plea. For upon the question, whether the decree ought to operate as a bar, the fact of fraud is the only point upon which issue can be joined between the parties; and unless the plea covers the fact of fraud, it does not meet the case made by the bill; and on argument of the plea, the charge of fraud, not being denied by the plea, must be taken to be true. If the bill states the decree only as a pretence of the defendant, which it avoids by stating, that if any such decree had been made it had been obtained by fraud, the decree must be pleaded, because the fact of the decree is not ad-

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ment of the court, whether by reason Gifb. For. Rom. 59 (2). of the matter stated in the plea he

the defendant by his plea declines to ought to be compelled to answer so answer (1); demanding the judg- much of the bill. See Arnold's case,

⁽¹⁾ By the 37th order of Aug. 1841, "No plea shall be held bad and overruled upon argument only because the answer of the defendant may extend to some part of the same matter as may be covered by such plea."

^{(2) [}Bolton v. Gardner, 3 Paige's C. R. 273. The only exception to this rule, is the case where the answer is necessary to support the plea, as where the bill charges circumstances calculated to avoid the anticipated bar of the defendant. There, it is proper, not only that the plea should contain all necessary averments to remove those circumstances out of the way, but the defendant must support the plea by an answer also denying the circumstances. Ferguson v. O'Hara, 1 Peters' C. C. R. 493.]

mitted by the bill; and the charge of fraud must also be denied by the plea for the reasons before stated. If the bill states the decree absolutely, but charges fraud to impeach it, yet the decree must be pleaded, because the decree if not avoidable is alone the bar to the suit; and the fraud by which the bar is sought to be avoided must be met by negative averments in the plea, because without such averments the plea would admit the decree to have been obtained by fraud, and would therefore admit that it formed no bar. When issue is joined upon such a plea, if the decree is admitted by the bill, the only subject upon which evidence can be given is the fact of fraud. If that should be proved, it would open the plea on the hearing of the cause; and the defendant would then be put to answer generally, and to make defence to the bill as if no such decree had been made. The object of the plea is to prevent the necessity of entering into that defence by trying first the validity of the decree. If the evidence of fraud should fail, the decree, operating as a bar, would determine the suit as far as the operation of the decree would extend.

It has also been objected, that a plea of the decree is a plea of the matter impeached by the bill; but the frame of a bill in equity necessarily produces, in various instances, this mode of pleading (c). If the bill stated the title under which, the plaintiff claimed, without stating the decree by which it had

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⁽c) See 3 P. Wins. 317, where objected to this mode of pleading, Lord Chancellor Talhot is stated to observing that it was every day's have interrupted the counsel, who practice.

been affected, the defendant might have pleaded the decree alone in bar. If the bill stated the plaintiff's title, and also stated the decree, and alleged no fact to impeach it, and yet sought relief founded on the title concluded by it, the defendant might demur; because upon the face of the bill the title of the plaintiff would appear to be so concluded. But as in the form of pleading in equity the bill may state the title of the plaintiff, and at the same time state the decree by which, if not impeached, that title would be concluded, and then avoid the operation of the decree by alleging that it had been obtained by fraud; if the defendant could not take the judgment of the court upon the conclusiveness of the decree by plea upon which the matter by which that decree was impeached would alone be in issue, he must enter into the same defence (by evidence as well as by answer) as if no decree had been made; and would be involved in all the expense and vexation of a second litigation on the subject of a former suit, which the decree, if unimpeached, had concluded. It is therefore permitted to him to avoid entering into the general question of the plaintiff's title as not affected by the decree, by meeting the case made by the plaintiff, which can alone give him a right to call for that defence, namely, the fact of fraud in obtaining the decree. This has been permitted to be done in the only way in which it can be done, by pleading the decree with averments denying the fraud alleged; and those averments being the only matter in issue, they are necessarily of the very substance of the plea. The decree if obtained by fraud would be no bar; and nothing can be in issue

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on a plea but that which is contained in the plea; and every charge in the bill not negatived by the plea is taken to be true on argument of the plea. If therefore the decree merely were pleaded, on argument of the plea, the charge of fraud must be taken to be true, and the plea ought therefore to be overruled; but if on argument the plea were allowed, or if the plaintiff, without arguing, replied to the plea, no evidence could be given on the charges of fraud to avoid the plea, and the defendant proving his plea (d), that is, proving the decree and nothing more, would be entitled to have the bill dismissed at the hearing (e).

As the averments negativing the charges of fraud are used merely to put the fact of fraud, as alleged Mode of making the averments. by the bill, in issue on the plea, they may be expressed in the most general terms, provided they are sufficient to put the charges of fraud contained in the bill fully in issue. And as the plaintiff is en-Answer in support of the ples. titled to have the answer of the defendant upon (1) oath to any matter in dispute between them, in aid

(d) Sir Joseph Jekyll, M. R. 3 P.

(e) Perhaps all the difficulties which have arisen upon this subject have proceeded from want of attention to the form of pleadings in courts of equity, especially since the disuse of special replications, rejoinders, surrejoinders, &c. When those pleadings were allowed, the plaintiff might have stated his case, without suggesting that it had been affected by any

decree; if the defendant pleaded a decree binding the right, the plaintiff might have replied, that the decree had been obtained by fraud, by which the plaintiff would have admitted that the decree was a bar, if not capable of impeachment on the ground of fraud; the defendant by rejoinder would have avoided the charge of fraud, and sustained the decree; and then the issue would have been simply on the fact of fraud.

⁽¹⁾ When com; lainant states a variety of matters which, if admitted as true, would be evidence to counterprove the allegations in the plea, (as in this case allegations of an adverse entry under claim of title and of an adverse holding it becomes necessary to negative those

of proof of the case made by the bill, the defendant must answer to the facts of fraud alleged in the bill so fully as to leave no doubt in the mind of the court that upon that answer, if not controverted by evidence on the part of the plaintiff, the fact of fraud could not be established (f). If the answer should not be full in all material points, the court may presume that the fact of fraud may be capable of proof in the point not fully answered, and may therefore not deem the answer sufficient to support the plea as conclusive, and therefore may overrule the plea absolutely, or only as an immediate bar, saving the benefit of it to the hearing of the cause. But though the answer may be deemed sufficient to support the plea upon argument, the plaintiff may except to the answer, if he conceives it not to be so full to all the charges as to be free from exception; or by amending his bill may require an answer to any matter which may not have been so extensively stated or interrogated to as

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from a supposition that the answer dence can be given. formed part of the defence. It is no

(f) It seems to have been ima- part of the defence, but that evidence gined that there was something incon- which the plaintiff has a right to regruous in a plea, and answer in sup- quire, and to use to invalidate the port of the plea, 6 Ves. 597. But defence made by the plea, upon arguthis objection seems to have arisen ment of the plea, before other evi-

matters by general averments in the plea, and to support the plea by answer as to such matters. The plea is not then double, (see infra p. 245, note.) Bogardus v. Trinity Church, 4 Paige's R. 195, 178.

The only way to test the sufficiency of an answer in support of a plea where it is objected that the plea is not sufficiently supported, is to consider every allegation in the bill as true which is not sufficiently denied by the answer; and then to inquire whether those facts being admitted, the plea is a sufficient bar to the claim of the complainant for relief. Such objection therefore necessarily connects itself with the merits of the defence set up in the plea and must be examined in that connection. Idem 197, 178.

the case would warrant, or to which he may apprehend that the answer, though full in terms, may have been in effect evasive.

As the bill must be founded on the supposition Effect of the that the plaintiff's title is not concluded by the decree, and the plea on the contrary supposition, the effect of the plea is, to conclude the whole case made by the bill, so far as it may be concluded by the decree, except the question of fraud; and consequently all the questions which might have been raised, if the decree had not been made, are put by the plea, if allowed, wholly out of the cause, unless the plea should be shown to be false in fact by evidence given on the issue taken upon it, and the matter of the plea thus opened upon the hearing. It is therefore a mistake to suppose that the plea, if sustained, would not shorten the cause, or lessen expense (g) (1).

As the ground of this defence by plea of a de-Decree of any peculiar court of cree is that the matter has been already decided, equity. a decree of any court of equity, in its nature final or made so by subsequent order, may be pleaded in bar of a new suit (h).

(g) The argument which is contained in the few preceding pages of the text, and the notes thereto, has been adopted and established by decided cases; but these not relating to decrees, they will be adduced hereafter in illustration of the doctrines Wing v. Wing, 10 Mod. 102; Anon. relating to the several pleas or legal bars sought to be set aside upon equi-

table grounds, with reference to which they have been respectively determined. See, however, here, 2 Ves. & B. 364; 6 Madd. 64, and 2 Sim. & Stu. 279.

(h) Geale v. Wyntour, Bunb. 211; Mos. 268; Pritman v. Pritman, 1 Vern. 310; Fitzgerald v. Fitzger-

⁽¹⁾ A former decree pleaded in bar need not appear to have been between precisely the same parties with the one to which it is pleaded. . but it must always appear to have been for the same subject matter, Mathews v. Roberts, 1 Green's Ch. R. 338.

suit depending.

2. Another suit depending in the same or another court of equity for the same cause (i) (1) is a good plea (k) (2); except, perhaps, in the case of a suit

ald, 5 Bro. P. C. 567, Toml. Ed.; but, as to the authority of this particular case, except in principle, see stat. 23 Geo. III. c. 28, and stat. 39 v. Read, ibid. 590; Murray v. Shad-& 40 Geo. III. c. 67, art. 8. See also Pitcher v. Rigby, 9 Pri. Ex. R.

- (i) Ord. in Cha. Ed. Bea. 26, 176; Crofts v. Wortley, 1 Ca. in Cha. 241; Foster v. Vassall, 3 Atk. 587; Bell well, 17 Ves. 353.
- (k) It seems, that the pendency of another suit for the same cause, in a
- (1) [The mere pendency of a suit in a foreign court, or in a court of the United States, cannot be pleaded in abatement or in bar to a suit for the same cause in a state court. Mitchell v. Bunce, 2 Paige's C. R. 606.] The court in Colt v. Partridge, 7 Metcalf R. (Massachusetts,) 574-6. 570, say that whether a plea in abatement, that another action between the same parties and the same cause is pending in another state is good, is not decided in that state. In New-York such plea has been held bad. Bowne v. Joy, 9 Johns. 221; Walsh v. Durkin, 12 Johns. 99. The pendency of another action in another state will not be a good plea, unless the judgment in such action will be a bar to this. Newell v. Newton, 10 Pick. 470. The plea in Colt v. Partridge, stated no case of an action by the present plaintiff against the present defendant pending in the court of chancery in the state of Vermont. It seems to the court that if such plea can be sustained when the parties stand in different relations, it can only be so when the first suit affords a full, plain and adequate remedy to the defendant in such suit, and opens all the grounds set up as the foundation of the second suit. But further, the suit in Vermont was by bill and the present at common law. The pendency of a bill in equity has not usually been considered as a sufficient ground for sustaining a plea, in abatement to an action at law. When both suits were by the same party it furnishes occasion for motion, that party elect which he will first proceed in. In these respects the plea in abatement was regarded as insufficient and the demurrer sustained. Ibid. Colt v. Partridge.
- (2) [See the form of such a plea, Willis, 534; Beames on Pleas, 330; Equity Draft. 117.] It is a rule of justice, applicable to all legal proceedings, that no one shall be twice vexed for the same cause. The reason why a second suit cannot be commenced for the same cause, pending a former is that it is unnecessary, inasmuch as the party prosecuting may have the same remedy under the first, which he could obtain by prosecuting another. Such was the doctrine in

depending in an inferior court of equity, the effect

court of concurrent equity jurisdiction, cannot, before a decree has been made in such other suit, be pleaded in bar. See Houlditch v. Marquis of Donegall, 1 Sim. & Stu. 491; but, that where the parties in both courts are the same, it may be pleaded for the purpose of obtaining a reference to a master, to inquire whether the suits are for the same matter, [and see 14 J. R. 501,] see Murray v. Shadwell. 17 Ves. 353, and of getting a decision, upon his report of the

fact, as to the validity of the plea, and consequently a determination of the question whether the plaintiff should or should not be allowed to proceed in the suit in which the plea has been filed. Barnard, 85. And see on this subject generally, Urlin v. ____, 1 Vern. 332; 1 Ves. 545; Daniel v. Mitchell, 3 Bro. C. C. 544; Anon. 1 Ves. Jun. 484; 2 Ves. & B. 110; Jackson v. Leaf, 1 Jac. & W. 229.

Massachusetts, on a libel filed by a husband for divorce, a mensa, &c., for desertion under statute of that commonwealth. And pending that libel, another statute authorized, for such cause, a libel for divorce a vinculo, &c. The pendency of the former suit was pleaded in abatement, and on demurrer to that plea, the court deciding that the same right did not exist in the two suits and therefore that the plea could not prevail. Stevens v. Stevens, 1 Metcalf R. 279.

A suit instituted by husband and wife against the trustees of her Plea of a former separate property in respect of a fraud, cannot be pleaded in bar to a subsequent suit by her and her next friend against her trustees and her husband and another person as parties to the fraud, although the relief prayed in both suits is the same, for the first suit is considered as the suit of the husband alone. Reeve v. Dalby, 2 S. & S. 464.

In the case of a plea of a former suit depending, where the former suit is for relief in respect of legal and equitable waste, but no evidence has been entered into with regard to the equitable waste, and the decree makes no decision respecting it, and the latter suit is exclusively for relief in respect of equitable waste, a plea of the former suit depending is bad: for the purpose sought to be attained by the latter suit cannot be attained by the former. Newdigate v. Newdigate, 8 Law J. (O. S.) Ch. R. 35. Complainant may dismiss his bill at any time before decree, upon payment of costs, and the court will upon proper application grant the order to dismiss on costs, as of course. But the cause is not out of court until the costs are actually paid or tendered; and if a new bill be filed without paying the costs pursuant to the conditional order to dismiss upon payment of costs, defendant may plead the pendency of the first suit as a bar to the commencement of the second before the order to discontinue had become absolute, by the payment of costs, on the pendency of former suit may be set up by plea or answer. Simpson v. Brewster, 9 Paige's R. 246-7. 245.

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of which the defendant has avoided by going out of the jurisdiction of that court (l). The plea must aver that the second suit is for the same matter as the first; and therefore a plea which did not expressly aver this, though it stated matter tending to show it, was considered as bad in point of form, and overruled upon argument (m). The plea must also aver that there have been proceedings in the suit, as appearance, or process requiring appearance at the least (n). It seems likewise regular to aver that the suit is still depending (o); though as a plea of this nature is not usually argued, but being clearly a good plea if true, is referred to the examination and inquiry of one of the masters of the court as to the fact (p), it has been held that a positive averment that the former suit is depending is not necessary (q) (1). And if the plaintiff sets down the plea to be argued, he admits the truth of the plea that a former suit for the same matter is depending, and the plea must therefore be allowed (r) unless it is defective in form (s). As the

⁽¹⁾ See Morgan v. —, 1 Atk. 408. See also Foster v. Vassall, 3 Atk. 587, and Lord Dillon v. Alvares, 4 Ves. 357.

⁽m) Devie v. Lord Brownlow, in Chan. 23d July, 1783, rep. Dick. 611.

⁽n) Anon. 1 Vern. 318: Moor v. Welsh Copper Comp. 1 Eq. Ca. Ab. 39.

⁽o) 3 Atk. 589.

⁽p) Ord. in Ch. Ed. Bea. 176, 177;2 Ves. & Bea. 110.

⁽q) Urlin v. ---, 1 Vern. 332.

⁽r) 1 Vern. 332; Anon. 1 Ves. Jun. 484; Daniel v. Mitchell, 3 Bro. C. C. 544.

⁽s) This is founded on a general order of the court, that the plaintiff

Plea of proceedings in another court.

⁽¹⁾ A plea of proceedings in another court must show not only that the subject-matter is the same, and the issue the same, but also that the object is the same; and that the court is a court of competent jurisdiction; and that the result of the proceedings therein would be conclusive, so as to bind every other court. Behrens v. Sieveking, 2 M. & C. 602. See supra p. 278 n.

pendency of the former suit, unless admitted by the plaintiff, is made the immediate subject of inquiry by one of the masters, a plea of this kind is not put in upon oath (t).

It is not necessary to the sufficiency of the plea that the former suit should be precisely between the same parties as the latter. For if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold (u). So where one part-owner of a ship filed a bill against the husband for an account, and afterwards the same part-owner and the rest of the owners filed a bill for the same purpose, the pendency of the first suit was held a good plea to the last (x); for though the first bill was insufficient for want of parties, yet by the second bill the defendant was doubly vexed for the same cause. The course which the court has taken where the second bill has appeared to embrace the whole subject

in dispute more completely than the first, has been to dismiss the first bill with costs, and to direct the [248]

shall not be put to argue such a plea. but may obtain, in the first instance, an order of reference to a master to inquire into the truth of it. Ord. in Cha. Ed. Bea. 176, 177; Baker v. Bird, 2 Ves. Jun. 672; Murray v. Shadwell, 17 Ves. 353; 2 Ves. & Bea. 110; Carwick v. Young, 2 Swanst. 239; Carrick v. Young, 4. Madd. 437. See 3 Atk. 589, as to 1771, in Chan. (1)

defects in the form of such a plea.

(t) 1 Vern. 332. This however can scarcely be deemed to extend to á case of a suit depending in a foreign court. And see Forster v. Vassall, 3 Atk, 587.

(u) Moor v. Welsh Copper Comp. 1 Eq. Ca. Ab. 39.

(x) Durand v. Hutchinson, Mich.

^{(1) [}See form of the plea which was used in this case, in Beames' Pleas, 336.]

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defendant in the second cause to answer upon being paid the costs of a plea allowed (y), which puts the case on the second bill in the same situation as it would have been in if the first bill had been dismissed before filing the second. Where a second bill is brought by the same person for the same purpose, but in a different right, as where the executor of an administrator brought a bill, conceiving himself to be the personal representative of the intestate, and afterwards procured administration de bonis non, and brought another bill (z), the pendency of the former bill is not a good plea. The reason of this determination seems to have been, that the first bill being wholly irregular the plaintiff could have no benefit from it, and it might have been dismissed upon demurrer. Where a decree is made upon a bill brought by a creditor on behalf of himself and all other creditors of the same person, and another creditor comes in before the master to take the benefit of the decree, and proves his debt, and then files a bill on behalf of himself and the other creditors, the defendants may plead the pendency of the former suit; for a man coming under a decree is quasi a party (a). The proper way for a creditor in such a situation to proceed, if the plaintiff in the original suit is dilatory, is by application to the court for liberty to conduct the cause (b).

⁽y) Crofts v. Wortley, 1 Ca. in Cha. 241.

⁽a) Neve v. Weston, 3 Atk. 557;1 Sim. & Stu. 361. (1)

⁽z) Huggins v. York Build. Comp. 2 Atk. 44.

⁽b) See Powell v. Walworth, 2 Madd. R. 183; Sims v. Ridge, 3

^{(1) [}Also Edmunds v. Acland, 5 Mad. 31]

If a plaintiff sues a defendant at the same time suing both at the same time law and in equifor the same cause at common law and in equity, ty. the defendant after answer put in (c) may apply to the court that the plaintiff may make his election (2) where he will proceed (d), but cannot plead the pendency of the suit at common law in bar of the suit in equity (e), though the practice was formerly otherwise (f). If the plaintiff shall elect to proceed in equity, the court will restrain his proceedings at law by injunction, and if he shall elect to proceed

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Meriv. 458; Edmunds v. Acland, 5 Madd. 31; Fleming v. Prior, 5 Madd. 423; Handford v. Storie, 2 Sim & Stu. 196. (1)

(c) 3 P. Wms. 90; 1 Ball & B. 119, 319; Fisher v. Mee, 3 Meriv. 45; Hogue v. Curtis, 1 Jac. & W. 449; Browne v. Poyntz, 3 Madd. 24; Coupland v. Bradock, 5 Madd.

(d) 3 P. Wms. 90; Anon. 1 Ves. Jun. 91; 1 Ball & B. 320; Pieters v. Thompson, Coop. R. 294 (3). But there is a distinction in the practice where the court is unable at once to see that it is a case of election. See Boyd v. Heinzelman, 1 Ves. & B. 381; 2 Ves. & B. 110; Mills v. Fry, 2 Madd. R. 395; Amory v. Brodrick, 1 Jac. R. 530, and the cases therein cited. In the instance of a mortga-

gee taking the usual bond for re-payment of the mortgage-money, he is not bound to elect, but may proceed, under certain restrictions, upon his separate securities at law and in equity. Schoole v. Sall, 1 Sch. & Lefr. 176. But where the plaintiff sues in both jurisdictions in an individual character, and can have in the former only a part of the relief which he can obtain in the latter; by instituting the suit in this court, he concludes himself from proceeding at law, and therefore of course is not entitled to the privilege of election. Mills v. Fry, 19 Ves. 277, (1815).

(e) .3 P. Wms. 90. And it should seem the pendency of a suit in an ecclesiastical court, for payment of a legacy, could not be pleaded to a bill for similar relief here. Howell v. Waldron, 1 Ca. in Cha. 85.

(f) Ord. in Cha. Ed. Bea. 177.

^{(1) [}And as to cases of creditors coming in under such a suit, see, amongst others, Codwise v. Geiston, on appeal, 10 J. R. 507; M'Dermutt v. Strong, 4 J. C. R. 687; Wilder v. Keeler, 3 Paige's C. R. 164.

⁽¹⁾ On this subject, see 1 Headlam's Daniell's Ch. Pr. 791, et seq. (2) [Livingston v. Kane, 3 J. C. R. 224; Sanger v. Wood, Ib. 416; Rogers v. Vosburgh, 4 ib. 84; Gibbs v. Perkinson, 4 Hen. & Munf. 415.]

at law the bill will be dismissed (g) (1). But if he should fail at law, this dismission of his bill will be no bar to his bringing a new bill (h).

Pleas in bar of matters of record or of matters in the nature of matters of record in some court of law. Pleas in bar of matters of record, or of matters in the nature of matters of record, in some court not being a court of equity, may be—1, a fine; 2, a recovery; 3, a judgment at law, or sentence of some other court.

1. Plea of fine and non-claim.

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1. A plea of a fine and non-claim, (2) though a legal bar, yet is equally good in equity (i) (3), provided it is pleaded with proper averments (k).

(g) 3 P. Wms. 90, note; Mousley v. Basnett, 1 Ves. & B. 382, note; Fitzgerald v. Sucomb, 2 Atk. 85.

(h) Countess of Plymouth v. Bladon, 2 Vern. 32.

(i) Thynne v. Townsend, W. Jones, 416; Salisbury v. Baggot, 1 Ca. in Cha. 278; 2 Swanst. 610;

Watkins v. Stone, 2 Sim. & Stu. 560.

(k) Story v. Lord Windsor, 2 Atk. 630; Hildyard v. Cressy, 3 Atk. 303; Page v. Lever, 2 Ves. Jun. 450; Butler v. Every, 1 Ves. Jun. 136; S. C. 3 Bro. C. C. 80; Dobson v. Leadbeater, 13 Ves. 230. The object of the averments is of course

(1) [Livingston v. Kane, 3 J. C. R. 224; Rogers v. Vosburgh, 4 ib. 84. Where the remedies at law and in equity are inconsistent, any decisive act of the party, with knowledge of his rights and of the facts, determines his election. Sanger v. Wood, 3 ib. 416.] Where a complainant is proceeding in a suit in equity, and in an action at law for the same subject matter, the defendant is not entitled to an order to compel him to elect in which suit he will proceed, until such defendant has fully answered the complainant's bill. Soule v. Corning, 11 Paige's Ch. R. 412.

(2) [See the form of a plea of a fine and non-claim, Willis, 537.]

(3) A fine and non-claim cannot be pleaded to a bill to prevent the setting up of an outstanding term. For the person in whom the legal estate in a satisfied term is vested is a trustee for the real owner of the estate; and a court of equity will prevent the termor from setting up the term, so as to prevent the trial at law of the question who is the real owner of the estate. It will not take upon itself to decide that question by deciding upon the operation of the fine and non-claim; because if it should decide against the title by fine and non-claim, that title might be again tired at law. Leigh v. Leigh, 1 Sim. 349.

Plea to a discovery as well as relief.

Ples of fine and

non-claim, in a suit to prevent

setting up of an

outstanding term.

And to a bill by a plaintiff claiming as heir-at-law, and seeking a discovery, and an injunction to restrain the setting up of an outstanding term, a plea of a fine and conveyance in favor of the person under whom the defendant claims is a good defence both to the discovery and to the relief. Gait v. Osbaldeston, 1 Russ. 158.

Where a title is merely legal, though the defect is apparent upon the face of the deeds, yet the fine will be a bar in equity; and a purchaser will not be affected with notice so as to make him a trustee for the person who had the right. For a defect upon the face of title-deeds is often the occasion of a fine being levied (l). And even a fine levied upon bare possession, with non-claim, may be a bar in equity, if a legal bar, though with notice at the time the fine was levied (m). But with respect to equitable titles there is a distinction. For where the equity charges the land only, the fine bars (n), but where it charges the person only in respect of the land (o), the fine does not bar (p). Therefore if a man purchases from a trustee, and levies a fine, he stands in the place of the seller, and is as much a trustee as the seller was (r), provided he has notice of the trust, or is a purchaser without consideration (s). So if the grantee of a mortgagee levies a fine, that will not discharge the equity of redemption (t). But there are cases of equitable as well as of legal titles, in which a fine and nonclaim will bar, notwithstanding notice at the time of levying the fines (u) It has been determined,

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to show that it was an effectual fine, 13 Ves. 233.

⁽l) 2 Atk. 631.

⁽m) Brereton v. Gamul, 2 Atk. 240.

⁽n) Gifford v. Phillips, cited 2 Swanst. 612.

⁽o) Earl Kenoul v. Grevil, cited 2 Swanst. 611; S. C. 1 Ca. in Cha. 295.

⁽p) 1 Ca. in Cha. 278; 2 Swanst.611; and see 2 Atk. 390; 1 Sch. & Lefr. 381.

⁽r) 2 Atk. 631; Kennedy v. Daly, 1 Sch. & Lefr. 355.

⁽s) Gilb. For. Rom. 62; Bovy v. Smith, 2 Ca. in Cha. 124; S. C. 1 Vern. 60, and 1 Vern. 84; on rehearing see 1 Vern. 144, the decree was reversed: but see 1 Sch. & Lefr. 379, 380.

⁽t) 2 Atk. 631; Contra, 2 Freem. 21, 69; but see 1 Sch. & Lefr. 378, 380.

⁽u) 2 Atk. 361; Hildyard v. Cressey, 3 Atk. 303; Shields v. Atkins; 3 Atk. 560.

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however, that if a fine is levied where the legal estate is in trustees for an infant, and the trustees neglect to claim, the infant, claiming by bill within five years after he attains twenty-one, shall not be barred (x). But perhaps this should be understood as referring to the case of a fine levied with notice of the title of the infant (y). Where a title to lands is merely equitable, as in the case of an agreement to settle lands to particular uses, claim to avoid the fine must be by subpana(z). The pendency of a suit in equity will therefore in equity prevent in many cases the running of a fine (a). Upon the whole, wherever a person comes in by a title opposite to the title to a trust estate (b), or comes in under the title to the trust estate, for a valuable consideration, without fraud, or notice of fraud or of the trust (c), a fine and non-claim may be set up as a bar to the claim of a trust (d). When a fine and non-claim are set up as a bar to a claim of a trust, by a person claiming under the same title, it is not sufficient to aver that at the time the fine was levied the seller of the estate being seised, or pretending to be seised, conveyed; but it is necessary to aver that the seller was actually seised. It is not, indeed, requisite to aver, that the seller was seised in fee; an averment that he was seised ut de libero tenemento, and being so seised a fine was levied,

⁽x) Allen v. Sayer, 2 Vern. 368.

⁽y) Wych v. E. I. Comp. 3 P. Wms. 309; Earl v. Countess of Huntington, ibid. 310, note G.

⁽z) Salisbury v. Baggott, 1 Ca. in Cha. 278; S. C. 2 Freem. 21, and more accurately reported, from Lord Nottingham's MSS. 2 Swanst. 603.

⁽a) 2 Atk. 389, 390; Pincke v.
Thornycroft, 1 Bro. C. C. 289; S. C.
4 Bro. P. C. 92, Toml. Ed.; 1 Sch. & Lefr. 432.

⁽b) Stoughton v. Onslow, cited 2 Swanst. 615; and 1 Freem. 311.

⁽c) 1 Sch. & Lefr. 380.

⁽d) Gilb. For. Rom. 63.

will be sufficient (e). A fine and non-claim may be pleaded in bar to a bill of review (f).

2. To a claim under an entail, a recovery duly 2. Plea of a resuffered, with the deed to lead the uses of that recovery, may be pleaded, if the estate limited to the plaintiff, or under which he claims, is thereby destroyed (g)(1).

3. If the judgment of a court of ordinary jurisjudgment of a court of ordinary jurisjudgment of a court of ordinadiction has finally determined the rights of the par-ry jurisdiction. ties, the judgment may in general be pleaded in bar of a bill in equity (h). Thus where a bill was brought by a person claiming to be son and heir of Joscelin, Earl of Leicester, and alleged that the earl, being tenant in tail of estates, had suffered a recovery, and had declared the use to himself and a trustee in fee, and that the plaintiff had brought

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- And see the cases cited above, p. 293, Cha. on Jurisd. of the Court of Cha.; note (k).
- 189.
- 754; Salkeld v. Salkeld, 1763, before Lord Northington; Brown v. Williamson, Trin. 1772, before Lord Bathurst.
- Co. Inst. 86; S. C. cited also in a Ord. in Cha. 19, Ed. Bea.

(e) 2 Atk. 630; 2 Sch. & Lefr. 99. Tract published at end of 1 Rep. in Hunby v. Johnson, 1 Rep. in Cha. (f) Lingard v. Griffin, 2 Vern. 243; Bluck v. Elliot, Finch R. 13; Pitt v. Hill, Finch R. 70; Temple (g) Att. Gen. v. Sutton, 1 P. Wms. v. Baltinglass, Finch R. 275; Cornell v Ward, Finch R. 239; Wilcox v. Sturt, 1 Vern. 77; Bissell v. Axtell, 2 Vern. 47; Penvill v. Luscombe, (1728), rep. 2 Jac. & W. 201; (h) See Throckmorton v. Finch, 4 3 Bro. C. C. 72; 1 Sch. & Lefr. 204;

⁽¹⁾ Where a plaintiff claims as heir at law of a person who devised Pleas of a recoestates tail, reserving the ultimate reversion to her own right heirs, very. and the bill alleges that no valid recovery was suffered, or if it were, that the property was so settled that the plaintiff is entitled as he r of the testator; a plea which sets forth the substance of the recovery and of the deeds making the tenant to the præcipe and leading the uses of the recovery, showing that a recovery was suffered by the tenant for life and the ultimate remainderman in tail, to the use of another person in fee, is a good defence, although not supported by any answer Plunkett v. Carendish, 1 Russ. & My. 713.

a writ of right to recover the lands, but the defendant had possession of the title-deeds, and intended to set up the legal estate which was vested in the trustee, and prayed a discovery of the deeds, and that the defendant might be restrained from setting up the estate in the trustee, the defendant pleaded, as to the discovery of the deeds and relief, judgment in her favor in the writ of right; and averred that the title in the trustee, which the bill sought to have removed, had not been given in evidence: and the plea was allowed (i). In this case the bill was brought before the trial in the writ of right, and the plaintiff had proceeded to trial without the discovery and relief sought by his bill for the purposes of the trial. The plea was subsequent to the judgment. It may be doubted therefore whether the averment that the title in the trustee had not been given in evidence on the trial of the writ of right was necessary, as the judgment was a bar, as a release subsequent to the filing of the bill would have been; and if the plaintiff could have avoided the effect of the judgment because the title in the trustee had been given in evidence, it should seem that that fact, together with the fact of the judgment, ought to have been brought before the court by another bill in the nature of a bill for a new trial, either as a supplemental bill, or as an original bill, the former bill being dismissed (k).

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⁽i) Sidney, styling himself Earl of Leicester v. Perry, in Chan. 23d July, 1783.

⁽k) Respecting the dispute in the time of Lord Ellesmere, raised by Lord Coke, upon the question whe-

ther a court of equity could give relief after a judgment at law, see 3 Blackst. Comm. p. 54; Gilb. For. Rom. 56; and the Tract on the Jurisdiction of the Court of Chancery, comprising the order of the king (James I.), on

To a bill to set aside a judgment, as obtained against conscience (1), the defendant has been permitted to plead the verdict and judgment in bar (m) (2); but it may be doubted whether in this case the defendant might not have demurred to the bill, as there does not appear to have been any charge in the bill requiring averment to support the plea. A sentence of any (n) (3), even a foreign court (o), may be a proper defence by way of plea; but the court pronouncing the sentence must at least have had

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the subject published at the end of 1 Rep. in Cha. Ed. 1715 (1), and that order at end of Cary's Reports, Ed. 1650.

- (l) 2 Ves. Jun. 135.
- (m) Williams v. Lee, 3 Atk. 223. And see Sewel v. Freeston, 1 Ca. in Cha. 65; Shuter v. Gilliard, 2 Ca. Finch R. 171; Huddlestone v. As-

bugg, Finch R. 171; Anon. 3 Rep. in Cha. 25.

- (n) See the cases referred to, page 296, note (h).
- (o) See Newland v. Horseman, 1 Vern. 21; S. C. 2 Ca. in Cha. 74; Burrows v. Jemineau, Sel. Ca.in Cha. 69; S. C. Mos. 1 Dick. 48; Gage v. in Cha. 250; Armstead v. Parker, Bulkeley, 3 Atk. 215; S. C. 2 Ves. 556; White v. Hall, 12 Ves. 320.

^{(1) [}See a more correct copy of this tract in the Collectanea Juridica, vol. i. p. 23: and also see Hallam's Const. Hist. vol. i. p. 370, (English edit.)].

⁽²⁾ See the form of such a plea, Willis, 548; and also the form of the plea used in Williams v. Lee, supra.]

⁽³⁾ A decision of an ecclesiastical council may be pleaded; thus where the minister and his parish in Massachusetts, submit a controversy to an ecclesiastical council, its decision, not impeached for good cause, is a justification of the party conforming to it, though it does not, ex proprio vigore, operate as a judgment. It has been viewed in the light of an arbitration and award; but it is not conclusive in all respects. The minister having conformed to it, sued for his salary, and on bill filed by the parish for discovery, alleging he had forfeited his office on ground, which was the very subject submitted and praying he might answer on oath touching the same; a plea in bar of the decision and his conformation thereto, was allowed, and the court held that he was not compelled to make the discovery sought, because the decision precluded the parish from any evidence in support of the ground so alleged for forfeiture by way of defence to said action. Proprietors of Hollis Street Meeting-House v. Pierpont, 7 Metcalf R. (Mass.) 495.

full jurisdiction to determine the rights of the parties (p) (4). If there is any charge of fraud, or other circumstance shown as a ground for relief, the judgment or sentence cannot be pleaded (q), unless the fraud, or other circumstance, the ground upon which the judgment or sentence is sought to be impeached, be denied, and thus put in issue by the plea, and the plea supported by a full answer to the charge in the bill (r). Upon this principle the court of exchequer determined upon a bill brought by insurers of part of the property taken on board the Spanish ships at Omoa. The bill charged that the navy, on whose behalf, as captors, the defendants had insured, where not the real captors, or not the only captors; that the Spanish ship struck to the land-forces; and that although the court of admiralty had condemned the ship taken as prizes to the navy, yet that condemnation had been obtained in consequence of the king's procuratorgeneral having withdrawn a claim made on behalf of the crown at the instance of the land-forces, and of an agreement between the sea and landforces to make a division of the treasure; and that the sentence was therefore, as against the

Edwards V. C. Reports, 327.]

[[]And see Van Wyck v. Seward, 1

last page at the end of 1 Rep. in Cha. swer, see p. 281, et seq.

⁽p) Gage v. Bulkeley, 2 Atk. 215. and of Cary's Rep.; and see 2 Ves. Jun. 135.

⁽r) 6 Ves. 596. As to the neces-(q) See 2 Ca. in Cha. 251; and sity of these averments in the plea, see the tract and order referred to in and the support of the plea by an-

Plea of a foreign judgment.

⁽¹⁾ A plea of a foreign judgment must show that the general fact which is stated by the plaintiff as the ground of equity was decided by a foreign court of competent jurisdiction not to be a ground of equity. Garcias v. Ricardo, 14 Sim. 265.

plaintiffs the insurers, not conclusive. The defendants pleaded the sentence of the admiralty, both to discovery of the fact stated in the bill, and to the relief prayed. The plea was in many respects informal, but the court was of opinion that the sentence thus impeached could not be pleaded in bar to the discovery sought by the bill, and that as a bar to relief, it ought to have been supported by averments negativing the grounds on which it was impeached by the bill (s) (1).

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A will, and probate even in the common form, in the proper ecclesiastical court, which is in the nature of a sentence (t), is a good plea to a bill by persons claiming as next of kin to a person supposed to have died intestate (u). And if fraud in obtaining the will is charged, that is not a sufficient equitable ground to impeach the probate; for the parties may resort to the ecclesiastical court, which is competent to determine upon the question of fraud (x). But where the fraud practised has not gone to the whole will, but only to some particular clause, or if fraud has been practised to obtain the consent of next of kin to the probate (y), the courts of equity have laid hold of these circumstances to

⁽s) Parkinson v. Lecras, 23d Feb. v. Branshy, 7 Bro. P. C. 437, Toml. 1781.

⁽t) See 1 Atk. 516.

⁽u) Jauncy v. Sealey, 1 Vern. 397.

⁽x) Archer v. Mosse, 2 Vern. 8; 12 Ves. 298 (1). Nelson v. Oldfield, 2 Vern. 76; Att. Gen. v. Ryder, 2 Ca. in Cha. 178; may be given where a probate has Plume v. Beale, 1 P. Wms. 388; 2 been obtained by fraud, see Barnesly P. Wms. 287; 2 Atk. 324; Kerrick v. Powel, 1 Ves. 284.

Ed.; Meadows v. Duchess of Kington, Mich. 1777, reported Ambl. 756; 5 Ves. 647; Griffiths v. Hamilton,

⁽y) As to the kind of relief which

^{(1) [}And see notes at page 123, ante; also Jones v. Jones, 7 Price, 663.]

declare the executor a trustee for the next of kin (y). Where there are no such circumstances the probate of the will is a clear bar to a demand of personal estate (z); and where a testator died in a foreign country, and left no goods in any other country, probate of his will according to the law of that country was determined to be sufficient against an administration obtained in England (a).

Pleas in bar of matters in pais.

Pleas in bar of matters in pais only sometimes go both to the discovery sought, and to the relief prayed by the bill, or by some part of it; sometimes only to the discovery, or part of the discovery; and sometimes only to the relief, or part of the relief.

Pleas of this nature (which may go both to the discovery and relief sought by the bill, or by some part thereof, but which sometimes extend no further than the relief) are principally: 1. A plea of a stated account (1); 2. Of an award; 3. A release (2);

(y) Marriot v. Marriot, in Exch. Ambl. 762, 763. 1 Stra. 666, and argument of Ld. Ch. Baron Gilbert, Gilb. Ca. in Cha. 203.

(z) 12 Ves. 307.

(a) Jauney v. Sealey, 1 Vern. 397.

(1) [It is a strong rule of equity that a general release shall be confined to what was under consideration at the time of giving it. M'Intyre v. Clarke, 1 Edwards' V. C. Reports, 34.]

^{(2) [}In setting up a defence under a public statute, it is not necessary, either in this court or in a court of law, that the pleader should set forth the statute in his plea, or that he should allege the existence of a statute of which the court is judicially bound to take notice. It is sufficient for him to state the facts which are necessary to bring the case within the operation of the statute; and to insist that upon these facts the plaintiff's right or remedy is at an end. The court will then judicially take notice of the existence of the statute and declare its legal effect upon the case as made by the pleadings. Per Chancellor Walworth, in Bogardus v. Rector, &c., of Trinity Church, 4 Paige's C. R. 197-8. 178, supra, p. 318. Indeed, it seems more appropriate in

4. Of a will or conveyance, or some instrument controlling or affecting the rights of the parties; 5. A plea of any statute which may create a bar to the plaintiff's demand, as the statute for prevention of frauds and perjuries, or the statutes for limitation of actions, which may be considered as a plea of matter in pais; for though the statute itself is usually set forth in the plea, yet that perhaps is unnecessary, and the substance of the plea consists in the averment of matter necessary to bring the case within the particular statute; and therefore if those matters appeared on the face of the bill itself it may be presumed a demurrer would hold, though this has been doubted.

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1. A plea of a stated account is a good bar to a 1. Plea of a stated account. bill for an account (b). It must show that the account'was in writing, or at least it must set forth the balance (c). If the bill charges that the plaintiff

(b) Anon. 2 Freem. 62; 1 Vern. & W. 201; Irvine v. Young, 1 Sim 180; Dawson v. Dawson, 1 Atk. 1; & Stu. 333. Sumner v. Thorpe, 2 Atk. 1; Pen-(c) 2 Atk. 399. (1) vil v. Luscombe, (1728), rep. 2 Jac.

this court to plead the facts merely which bring the case within the operation of the principle of the statute, than to plead the statute, in terms, as a bar. Ib. But see Salters v. Tobias, 3 Paige's C. R. 338.]

(1) [Hodder v. Watts, 4 Price, 8; Bogardus v Rector, &c., of Trinity Church, 4 Paige's R. 178. Where a plea of a stated account speaks of the balance which was admitted upon it, and avers the account to be just and true, it must, nevertheless, be supported by an answer denying the receipt of any part of the money for which the defendant is called to account subsequently to the time when the account stated was adjusted. Danels v. Taggart's administrator, 1 Gill & Johns. 311.]

A plea of an account stated and settled should state that the complainant and defendant made up stated and settled an account in writing, and that the complainant after examination approved of said account. These allegations are in all the precedents and are important.

has no counterpart of the account, the account should be annexed by way of schedule to the answer, that if there are any errors upon the face of it the plaintiff may have an opportunity of pointing them out (d). If error (e) or fraud (f) is charg-

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- (d) Hankey v. Simpson, 3 Atk. 303 (2).
- (e) On the subject of this court's interference, where there is error in a settled account, see Anon. 2 Freem. 62; Proud v. Combes, 2 Freem. 183; S. C. 3 Rep. in Cha. 18; 1 Ca. in Cha. 55; 2 Freem. 183; Nels. 100; and 1 Eq. Ca. Ab. 12; Wright v. Coxon, 1 Ca. in Cha. 262; Bedell v. Bedell, Finch R. 5; Dawson v. Dawson, 1 Atk. 1; Bourke v. Bridgeman,
- 1 Barnard, 272; Roberts v. Kuffin, 2 Atk. 112; Pit v. Cholmondeley, 2 2 Ves. 565; Johnson v. Curtis, 3 Bro. C. C. 266; Gray v. Minnethorpe, 3 Ves. 103; Lord Hardwicke v. Vernon, 4 Ves. 411; 5 Ves. 837; Kinsman v. Barker, 14 Ves. 262 (3).
- (f) As to its interference where the settlement of an account has been accompanied with fraud, see Vernon v. Vawdry, 2 Atk. 119; Newman v. Payne, 2 Ves. Jun. 199; Wharton

When all the allegations of the plea being taken as true do not make out a full defence, the plea cannot be sustained. But where the court believed that the omission of the necessary allegations was accidental and could readily be supported, the court would allow defendant to amend it in these particulars, and in default thereof the plea was ordered to stand for answer, with leave to complainant to except to it. The answer in support of the plea, though not stated to be so, was decidedly so, and was also allowed to be amended in a formal omission of stating it to be in support of the plea. Meeker v. Marsh, Ex'r, &c., Saxton (N. J.) Ch. R. 203-4, 198.

Such is the peculiar nature of this kind of pleading in equity that a court should always be careful to see that it sets forth plainly and explicitly every matter necessary to constitute a complete defence and bar to the complainant's claim. For if the plea be allowed by the court as correctly pleaded, and is afterwards proved, the cause is at an end. The allowance of a plea, says Lord Redesdale, is as complete a judgment against the claims of plaintiff, as can be given on the most solemn and deliberate hearing of the cause on the pleadings and proofs, provided the truth of the plea be established by evidence. 2 Scho. & Lef. 725. Roche v. Morgall, quoted in Meeker v. Marsh, Saxton C. R. 203-4. 198.

- (2) [Blackledge v. Simpson, 1 Hayward's R. 259. Weed v. Small, 7 Paige's Ch. R. 573.]
 - (3) [Chappedelaine v. Decheneauz, 4 Cranch, 306.]

ed (g) it must be denied by the plea as well as by way of answer (h) (1); and if neither error nor fraud is charged, the defendant must by the plea aver that the stated account is just and true to the best of his knowledge and belief (i). The delivery up of vouchers at the time the account was stated seems to be a proper averment in a plea of this nature (k), if the fact was such (l) (2).

2. An award may be pleaded to a bill to set aside award. 2. Plea of as

v. May, 5 Ves. 27; Beaumont v. And see above, p. 280, et seq. Boultbee, 5 Ves. 485; S. C. 7 Ves. 599; 11 Ves. 358; Langstaffe v. Taylor, 14 Ves. 262; Drew v. Power, 1 Sch. & Lefr. 182.

(g) 9 Ves. 265, 266.

(h) Gilb. For. Rom. 56; 1 Ca. in Cha. 299; 2 Freem. 62; 6 Ves. 596; Clarke v. Earl of Ormonde, 1 Jac. R. 116. And, it seems, if the plaintiff allege that he has no counterpart of the stated account, the defendant must annex a copy thereof to his plea, Hankey v. Simpson, 3 Atk. 303.

(i) 3 Atk. 70; 1 Eq. Ca. Ab. 39; 2 Sch. & Lefr. 727. And see Matthews v. Walwyn, 4 Ves. 118; Middleditch v. Sharland, 5 Ves. 87; [Bogardus v. Rector, &c. Trinity Church, 4 Paige's R. 178.]

(k) Gilb. For. Rom. 57; Walker v. Consett, Forrest's Exch. R. 157; Hodder v. Watts, 4 Pri. Exch. R. 8. And see Wharton v. May, 5 Ves. 27.

(1) 2 Atk. 252. See the case of Clarke v. Earl of Ormonde, 1 Jac. R. 116.

(1) A plea of a legal bar (such as a full, true, and settled account, and a release,) is defective if it does not explicitly negative, so as to plea of a legal bar should neggive the plaintiff an issue on the plea to try, circumstances which are ative circum charged by the bill (such as fraud and collusion), and which, if true, the bar. would render the legal bar insufficient. And this is the case even though such matters are positively denied by an answer in support of the plea. Phelps v. Sprowle, 1 My. & K. 231, decided by Lord Brougham, C., overruling the decision of the Vice-Chancellor.

(2) A plea, by a trustee, of a settled account and release, to inquiries Pienof a settled account and reas to the execution of a trust, is bad, if it does not aver that the matters lease. inquired after appear from the account. And a plea of a settled account and release to a bill by a cestui que trust against a trustee will not protect the trustee from a discovery of vouchers. Clarke v. The Earl of Ormonde, Jac. 116.

[See the form of a plea of a stated account, Willis, 550; and observe the notes there.]

Necessity that

the award and open the account (m); and it is not only good to the merits of the case, but likewise to the discovery sought by the bill (n). But if fraud or partiality is charged against the arbitrators (o), the charge must not only be denied by way of averment in the plea, but the plea must be supported by an answer showing the arbitrators to have been incorrupt and impartial (q); and any other matter stated in the bill as a ground for impeaching the award must be denied in the same manner (2).

3. Plea of a re-

- 3. If the plaintiff, or a person under whom he claims, has released the subject of his demand, the defendant may plead the release in bar of the bill (r)(3),
- (m) Lingood v. Croucher, 2 Atk.
 395; Lingood v. Eade, S. C. 2 Atk.
 501; Burton v. Ellington, 3 Bro.
 C. C. 196 (1).
- (n) Tittenson v. Peat, 3 Atk. 529; Anon. 3 Atk. 644. As to a plea of an award under an agreement to refer the matters in dispute to arbitration, entered into after bill filed, see Dryden v. Robinson, 2 Sim. & Stu. 529; and see Rowe v. Wood, 1 Jac. & W. 348; S. C. 2 Bligh, P. C. 595.
- (o) As instances, see Ward v. Periam, cited 2 Atk. 396; 2 Ves. 316;
- S. C. reported 1 Turn. R. 131, note; Chicot v. Lequesne, 2 Ves. 315; 2 Ves. Jun. 135; Reynell v. Luscombe, 1 Turn. R. 135, n.; Goodman. v. Sayers, 2 Jac. & W. 249; Auriol v. Smith, 1 Turn. R. 121; Dawson v. Sadler, 1 Sim. & Stu. 537.
- (q) 2 Atk. 396; 6 Ves. 594, 596;
 2 Ves. & B. 364; and see Allardes
 v. Campbell, rep. 1 Turn. 133, note;
 S. C. Bunb. 265; Rybott v. Barrell,
 2 Eden R. 131.
- (r) Bower v. Swadlin, 1 Atk. 294; Taunton v. Pepler, 6 Madd. 166;

^{(1) [}As to applications to enforce awards, see the case of Webster, 1 Russ. & M. 496, and note (a) there. For the form of a plea of an award, see Willis, 553.]

^{(2) [}And see Henrick v. Blair, 1 J. C. R. 101; Shepard v. Merrill, 2 Ib. 276; Underhill v. Van Cortlandt, 2 Ib. 339; Bouck v. Wilber, 4 Ib. 405; Toppan v. Heath, 1 Paige's C. R. 293; Campbell v. Western, 3 Ib. 124; Fitzpatrick v. Smith, 1 Desau, 245; Atwyn v. Perkins, 3 Ib. 297; Shermer v. Beale, 1 Wash. 11; Pleasants v. Ross, Ib. 156; Morris v. Ross, 2 Hen. & Munf. 408; Davy's Executors v. Shaw, 7 Cranch, 171.]

⁽³⁾ To a bill by a husband and wife for property limited to the sepa-

and this will apply to a bill praying that the release may be set aside (s). In a plea of a release the defendant must set out the consideration upon which the release was made (t). A plea of a release therefore cannot extend to a discovery of the consideration; and if that is impeached by the bill, the plea must be assisted by averments covering the grounds on which the consideration is so impeached (2). Thus, to a bill stating various transactions between the defendant and the testator of the plaintiff, and imputing to those transactions fraud and unfair dealing on the part of the defendant, and impeaching accounts of the transactions delivered by the defendant to the testator on the ground of errors, omissions, and unfair and false charges, and also impeaching a purchase of an estate conveyed by the testator to the defendant in consideration of part of the defendant's alleged

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Clarke v. Earle of Ormonde, 1 Jac. R. 116. And see Roche v. Morgell, 2 Sch. & Lefr. 721.

(s) Pusey v. Desbouverie, 3 P. Wms. 315. And with regard to this latter proposition, it may be remarked, that it is in like manner necessary that the defendant should deny the equitable circumstances charged for the purpose of impeaching the release, by averments in his plea, and by an answer to the same effect, Lloyd v. Smith, 1 Anstr. Exch. R. 258; Freeland v. Johnson, 1 Anstr. Exch. R. 276; Walter v. Glanville, 5 Bro. P. C. 555, Toml. Ed.; 2 Sch. & Lefr. 727; 6 Mad. 64; 2 Sim. & Stu. 279 (1).

(t) Gilb. For. Rom. 57; Griffith v. Manser, Hardr. 168; 2 Sch. & Lefr. 728; and see Walter v. Glanville, 5 Bro. P. C. 555, Toml. Ed.

rate use of the wife, a plea of a release by the husband is a good plea. Plea of release by a husband of his wife's pro-

perty.

⁽¹⁾ See also Parker v. Alcock, 1 Y. & J. 432.

[[]See the form of such a plea, Willis, 556.]

^{(2) [}And see Allen v. Randolph, 4 J. C. R. 693; Bolton v. Gardner, 3 Paige's C. R. 273; also (but which was the case of an answer,) Bavies v. Spurling, 1 Tamlyn's R. 199.]

demands, and praying a general account, and that the purchase of the estate might be set aside as fraudulently obtained, and the conveyance might stand as a security only for what was justly due from the testator's estate to the defendant; a plea of a deed of mutual release, extending to so much of the bill as sought a discovery, and prayed an account of dealings and transactions prior to and upon the day of the date of the deed of release, and all relief and discovery grounded thereupon, and stating the deed to have been founded on a general settlement of accounts on that day, and to have accepted securities then given to the defendant for the balance of those accounts which was in his favour, and averring only that the deed had been prepared and executed without any fraud or undue practice on the part of the defendant, was overruled. The consideration for the instrument was the general settlement of accounts; and if those accounts were liable to the imputations cast upon them by the bill (u), the release was not a fair transaction and ought not to preclude the court from decreeing a new account. The plea therefore could not be allowed to cover a discovery tending to impeach those accounts, and the fairness of the settled accounts was not put in issue by the plea, or supported by an answer denying the imputations charged in the bill (1). The plea indeed was defective in

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⁽u) Though an account be stated relieve. See the cases cited above, under hand and seal, yet if there appear any mistake in it, the court will

⁽¹⁾ In an answer in support of a plea, the defendant must answer all those matters in a bill, which, if true, would displace the plea,

many other particulars, necessary to support it against the charges in the bill; and to some parts of the case made by the bill the release did not extend (x). A release pleaded to a hill for an account must be under seal (y); a release not under seal must be pleaded as a stated account only (z) (2).

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4. To a bill brought upon a ground of equity by 4. Pleas of a will, conveyance, or other instruan heir at law against a devisee, to turn the devisee ment. out of possession, the devisee may plead the will, and that it was duly executed (a) (3). But in cases of this kind where the bill has also prayed a receiver, a plea extending to that part of the bill has been so far overruled, as it might be necessary for the court in the progress of the cause to appoint a receiver (b). Upon a bill filed by an heir against a person claiming under a conveyance from the ancestor, the defendant may plead the conveyance in [264] bar of the suit. To a bill by one partner in trade against his copartner for discovery and relief relative to the partnership transactions, a plea of the arti-

Lefr. 721 (1).

⁽y) But it need not be signed. reported Ambl. 756; 3 Meriv. 171. Taunton v. Pepler, 6 Madd. 166.

^{; (}z) Gilb. For. Rom. 57. (a) Anon. 3 Atk. 17; Anstis v. Ves. 362, 363.

⁽x) Roche v. Morgell, 2 Sch. & Dowsing, cited 2 Ves. 361; Meadows v. Duch. of Kingston, Mich. 1777,

⁽b) Anon. 3 Atk. 17, and Meadows

v. Duch. of Kingston. But see 2

whether the bill does or does not expressly charge those matters to be evidence of the facts to which the plea relates. Chadwick v. Broadwood, 3 Beav. 530.

^{(1) [}And see Bolton v. Gardner, 3 Paige's C. R. 273.]

⁽²⁾ The correct mode of pleading a release in bar of an account is to state it as being under seal; but it would seem that this is not indispensable. Phelps v. Sprowle, 1 My. & K. 231.

^{(3) [}See the form of such a plea, Willis, 559; and observe the latter part of note (b) there. For another form of this species of plea, see Equity Draft. 118.]

cles of partnership, by which it was agreed that all

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differences which might arise between the partners should be referred to arbitration, and that no suit should be instituted in law or equity until an offer should have been made to leave the matter in difference to arbitration, and that offer had been refused, has been allowed (c). This case has been much questioned; and it now seems to be determined that such an agreement cannot be pleaded in a bar of suit (d), nor will the court compel a specific performance of the agreement (e). Indeed it seems impossible to maintain that such a contract should be specifically performed, or bar a suit, unless the parties had first agreed upon the previous question, what were the matters in difference, and upon the powers to be given to the arbitrators, amongst which the same means of obtaining discovery upon oath, and production of books and papers, as can be given by a court of equity might be essential to justice. The nomination of arbitrators also must be a subject on which the parties must previously agree; for if either party objected to the person nominated by the other, it would be unjust to compel him to submit to the decision of the person so objected to as a judge chosen by himself. It must also be determined that all the subjects of difference, whether ascertained or not, must be fit subjects for the determination of arbitrators, which,

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 ⁽e) Halfhide v. Fenning, 2 Bro.
 C. C. 336; Contra, Wellington v.
 Mackintosh, 2 Atk. 569.

⁽d) Satterly v. Robinson, Exch. 17 Dec. 1791; Michell v. Harris, 4 Bro. C. C. 311; S. C. 2 Ves. Jun. 129;

Street v. Rigby, 6 Ves. Jun. 815; 14 Ves. 270; Waters v. Taylor, 15 Ves. 10.

⁽e) 6 Ves. Jun. 818; Milnes v. Gery, 14 Ves. 400.

if any of them involved important matter of law, they might not be deemed to be.

5. The statute for prevention of frauds and per- 5. Plea of the statute of frauds juries (f) (1) may be pleaded in bar of a suit to which the provisions of that act apply (g) (3). This form of pleading generally requires negative averments to support the defence (h). Thus, to a bill for discovery and execution of a trust, the sta-

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(f) 29 Car. II. c. 3.

(g) Gilb. For. Rom. 61; Bawdes v. Amhurst, Prec. in Cha. 402; O'Reilly v. Thompson, 2 Cox, R. 271; Gunter v. Halsey, Ambl. 586; Jordan v. Sawkins, 3 Bro. C. C. 388; S. C. 1 Ves. Jun. 402; (2) Main v. Melbourn, 4 Ves. 720. As to the equitable grounds upon which a case may be exempted from the operation of the Statute of Frauds, see 3 Ves. 38, note (a).

(h) Stewart v. Careless, cited 2 Bro. C. C. 565; Dick. 42; Moore v.

Edwards, 4 Ves. 23; Bowers v. Cator, 4 Ves. 91; 2 Ves. & B. 364. And where there are not equitable circumstances stated in the bill, which might operate to prevent the relief sought by the plaintiff being barred by the statute, but the agreement is alleged to have been in writing, and facts are charged in evidence thereof, negative averments are also requisite to the defence. Evans v. Harris, 1 Ves. & B. 361; and see Jones v. Davis, 16 Ves. 262.

(2) [Harris v. Knickerbacker, on appeal, 5 Wendell's R. 638; S. C. 1 Paige's C. R. 209.]

A party to avail himself of the statute of frauds, must plead it or rely on it in some form. Thornton v. Henry, 2 Scammon's Ill. Rep. 219.

When a plea of the statute of frauds is overruled, if the defendant then files his answer, he waives and withdraws his plea; and has no longer any right to insist on the statute as a desence. Keatts'v. Rector, 1 Arkansas Rep. 391.

(3) [But see page 267, post.]

⁽¹⁾ And see 2 Revised States of New-York, 134, 135, 301. For the form of a plea of the statute of frauds, to a bill for specific performance, see Equity Draft. 107, (2d edit.); but observe the note there, whereby it appears that this plea was overruled and directed to stand for an answer; and see the text at page 267, post. There is another precedent, being in bar to so much of a bill as sought to compel the specific performance of a parol agreement for a lease. 2 Equity Draft, 112, (2d edit.)].

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tute, with an averment that there was no declaration of trust in writing, may be pleaded (i), though in the case cited the plea was overruled by an answer, admitting, in effect, the trust. To a bill for a specific performance of agreements, the same statute, with an averment that there was no agreement in writing signed by the parties, has been also pleaded (k). It has been understood that this plea extended to the discovery of a parol agreement, as well as to the performance of it, except where the agreement had been so far performed that it might be deemed a fraud on the party seeking the benefit of it, unless it was completely carried into execution (l), and cases have been determined accordingly (m). This has of late been the subject of much discussion, and some contrariety of decision. In one case (n) the court appeared to have conceived that the courts of equity in determining cases arising upon this statute had laid down two propositions founded on rules of equity, and had given a construction to the act accordingly, which amounted to this, that the act was to be construed as if there had been an express exception to the extent of those rules in favour of courts of equity, and that no action was to be sustained except upon

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⁽k) Mussell v. Cooke, Prec. in Chan. 533; Child v. Godolphin, cited 2 Bro. C. C. 566; S. C. Dick. 39; Child v. Comber, 3 Swanst. 423, n.; Hawkins v. Holmes, 1 P. Wms. 770; Clerk v. Wright, 1 Atk. 12.

⁽¹⁾ That this is the construction put upon acts of part performance, see 1 Sch. & Lefr. 41; 3 Meriv. 246;

⁽i) Cottington v. Fletcher, 2 Atk. Morphett v. Jones, 1 Swanst. 172, and the authorities therein referred to.

⁽m) Hollis v. Whiteing, 1 Vern. 151; Whaley v. Bagnal, 1 Bro. P. C. 345, Toml. Ed.; and see Whitbread v. Brockhurst, 1 Bro. C. C. 404; S. C. 2 Ves. & Bea. 153, n.; Whitchurch v. Bevis, 2 Bro. C. C. 559.

⁽n) Whitchurch v. Bevis, in Chan. 8 Feb. 1786, reported 2 Bro. C. C.

an agreement in writing, signed according to the requisition of the statute, and except upon bills in equity, where the party to be charged confessed the agreement by answer, or there was a part performance of the agreement. It was therefore determined that to the fact of the agreement the defendant must answer. But the court, afterwards upon a rehearing, allowed the plea (o). In subsequent cases this subject was much discussed, and the question was particularly considered, whether, if the defendant admitted by answer the fact of a parol agreement, but insisted on the protection of the statute, a decree could be pronounced for performance of the agreement without any other ground than the fact of the parol agreement thus confessed. At length it seems to have been decided, that though a parol agreement be confessed by the defendant's answer, yet if he insists on the protection of the statute no decree can be made merely on the ground of that confession (p); and it may now apparently be con-

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⁽o) Whitchurch v. Bevis, on rehearing, Hil. vac. 1789, principally v. Bevis, 2 Bro. C. C. 559; 4 Ves. on the authority of Whaley v. Bugnal, 1 Bro. P. C. 345, Toml. Ed.

⁽p) 1 Bro. C. C. 416; Whitchurch Jun. 23, 24; 6 V.s. 37; 12 Ves. 471; 15 Ves. 375 (1).

^{(1) [}In a suit for a specific performance of a contract in relation to land, if the bill states that an agreement was made, on demurrer to the bill, the contract will be presumed to have been reduced to writing and signed by the parties or their agents, unless the contrary appears. If the agreement, however, appears in the bill to have been a parol agreement and no facts are alleged to take the case out of the statute, the defendant may demur to the bill. Cozine v. Graham, 2 Paige's C. R. 177; 2 Revised Statutes of N. Y. 134, 135. And for cases of parol agreements and part performance, see among others, Weimor v. White, 2 C. C. E. 87, (sed vide, Jackson, ex dem Smith v. Pierce, 2 J. R. 221); Phillips v. Thompson, 1 J. C. R. 131; Parkhurst v. Van

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cluded that a plea of the statute cannot in any case be a bar to a discovery of the fact of an agreement; and that as the benefit of the statute may be had if insisted on by answer, there can be no use in pleading it in bar of relief. Whether the same rule would be applied to a confession of a trust by an answer, which may be considered as a declaration of the trust in writing, signed by the party, as indeed the confession of a parol agree. ment by answer might also be deemed, seems to be an important question, not agitated in the cases decided with respect to other agreements, and upon which it may be very difficult to make a satisfactory distinction. In the cases in which it was formerly considered that a plea of this statute was the proper defence, it was conceived that any matter charged by the bill which might avoid the bar created by the statute must be denied, generally, by way of averment in the plea, and particularly and precisely by way of answer to support the plea. But according to one case (q), if any such matter were charged in the bill it became impossible to plead the statute in bar; the court having determined that denial of the matter so charged made the plea double (r), and therefore informal; and it may now be doubtful whether a plea of the statute ought in any case (except perhaps the case of a trust) to extend to any discovery sought by the

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⁽q) Whitbread. v. Brockhurst, 1 (r) On the subject of double pleas, Bro. C. C. 404; S. C. 2 Ves. & B. see hereafter, pp. 343, 344. 153, note.

Cortland, Ib. 273; and also note of cases at page 119, ante; and English cases well collected in Blunt's Ambler, p. 585, note (2).

bill, and indeed whether it ought not to be deemed a needless and vexatious proceeding if confined to relief (s).

The statute for limitation of actions (t) is likewise a good plea (u) (1). But if the bill charges the of limits

- (3) As to the effect of insisting on' 1 status by ans you of by pleas and to the mer say, or Norter v. 1 Swanst. 172. | Cozine v. Bleeker, cited. 2 Paige's C. R. 177.]
 - (t) 21 Jac. I. c. 16. the Gab Fox. Rom. 61: Which v
- Last Indo Comp., 3 P. Venns. 30.); Preston, Prec. in Chan. 103. See Lacon'v. Lacon, 2 Atk. 395; Earl of also Kirk and Webb, Prec. in Chan. Strofford v. Blakeway, 6 Bro. P. C. 84. And see Rowe v. Teed, 15 Ves. 630, Toml. Ed.; Barber v. Barber, 372; 18 Ves. 182; Morphett v. Jones, 18 Ves. 286, and the cases therein

(1) A new statute of limitations (3 & 4 W. IV. c. 27) has been y sed; but it only applies to real property, and to money charged e on or payable out of real est te, and to legacies. This statute expressly extends to suits in equity. (See sect. 24.) It has been amended by stat. 7 W. IV. and 1 Vict. c. 28.

The statute of limitations may be pleaded in bar to a bill to prevent ' , we thing up of an outstanding term. Jermy v. B s', 1 Sim. 573.

See the form of such a plea, Willis, 562. And observe the note at page 273, post. For other forms, see Equity Draft. 113, 114; Beames on Pleas, 161.]

The rule is well settled in England and in this country that effect will be given to the statute of limitations in equity, the same as at law. The principle is well established and generally sanctioned in courts of equity, that by analogy the statute of limitations is a bar to an equitable right when at law it would operate against a grant. At law, it operates where conflicting titles are adverse in their origin and no reason is perceived against giving the statute the same effect in equity. Miller v. McIntire; 6 Peters, 65-67, 61.

Held in Kane v. Bloodgood; 7 Johns. Ch. R. 90; that the statute applies to legacy, since a remedy at law was given by statute to recover legacies and distributive shares. But such is not the law in England. Chancellor Kept went further than had been adventured and overturned a number of his previous decisions. King v. Executors of Perry, 2 Green C. R. 54:

The plea of the statute of limitations is a defence not to be favored. As a general rule it is inequitable, not favored, and the court will lend its aid to effect a trial on the merits, when it will set at least passive, while a defendant asks its assistance to close the door against such

a fraud, and that the fraud was not discovered (x)till within six years before filing the bill, the statute is not a good plea, unless the defendant denies the fraud (y), or avers that the fraud, if any, was not discovered within six years before filing the bill (z). And though the statute of limitations is a bar to the claim of a debt, it was formerly determined not to be a bar to a discovery when the debt became due; for if that had been set forth, it would appear to the court whether the time limited by the statute was elapsed (a), but later decisions have been to the contrary (b). These de-

cases therein cited. and 2 Ball & B. considered a double plea.

(y) Bicknell v. Gough, 3 Atk. 558. (1).

(z) South Sea Comp. v. Wy-But according to Whitbread v. Cork v. Wilcock, 5 Madd. 328.

(x) See 2 Sch. & Lefr. 631 and Brockhurst, 1 Bro. C. C. 404; and 2 633, and following pages, and the Ves. & B. 153, n.; this should be

> (a) Mackworth v. Clifton, 2 Atk. 51; 2 Sch. & Lefr. 635.

(b) Sutton v. Earl of Scarborough, 9 Ves. Jun. 71, and other mondsell, 3 P. Wms. 143; Sutton authorities there cited. And see v. Earl of Scarborovgh, 9 Ves. 71. Baillie v. Sibbald, 15 Ves. 185;

inquiry and to avail himself of his own laches in not paying the debt by the bar imposed by the statute unless he avail himself of such plea within the rule day. Ibid.

The plea must in itself, if true, contain a complete bar. It should not be a naked plea of the statute of limitations, but should contain averments negativing the special matters set up in the bill which if true would avoid the operation of the statute; and the answer in support of the plea should also contain a full discovery of the matters so set up in avoidance of the bar. It is not sufficient for the answer alone to negative such matters; for it is mere matter of discovery; but the plea should in itself, if true, contain a complete bar. This is stated at large by Lord Redesdale, in his excellent work on Equity Pleading. Stearns v. Page, 1 Story R. 212. After issue made up, or if defendant be in default, he is not allowed to put in the plea, unless under peculiar circumstances. Streets v. Baldwin's Adminstrator, 12 Ohio R. 131. 120

(1) [Goodrich v. Pendleton, 3 J. C. R. 384; and see Milnes v. Cowley, 4 Price, 103.]

cisions are stated to have been founded on a rule adopted of late years, that where a demurrer to relief would be good, the same ground of demurrer would extend to the discovery on which the relief prayed was founded; and applying this rule, originally confined to demurrers, to pleas also (c). It may be doubted whether in this extension of the rule to pleas, the difference between a plea and demurrer has been sufficiently considered. A demurrer founds itself on the bill, and asserts no matter of fact the truth of which can be disputed. A plea, on the contrary, asserts a fact the truth of which is put in issue by the plea. When, therefore the statute of limitations is pleaded to a demand, and the question to be tried on the issue joined upon the plea is, whether the debt became due within six years before the filing of the bill, it is denying the plaintiff the benefit of that discovery in aid of proof which is allowed in all other cases, to hold that a plea of the statute of limitations, with an averment that the cause of action, if any, occurred six years before the filing of the bill will be a bar to a discovery of the truth of that averment (d). In the case of money received by the defendant for the use of the plaintiff, and where the sums received, as well as the times when they were respectively received, may rest in the knowledge of the defendant only, it may amount to a complete denial of justice to hold that a plea of the statute of limitations, with such an

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⁽c) See the distinction taken on the subject, in James v. Sadgrove, 1 Sim. & Stu. 4.

⁽d) This argument is supported by Cork v. Wilcock, 5 Madd. 328; and 1 Sim. & Stu. 6.

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averment, is a bar to any discovery as to the sums received, and when received, and of whom, and as to entries in books, and other papers, which the discovery might enable the plaintiff to prove the falsehood of the plea by witnesses and production of papers, as well as by the defendant's answer. Where a particular special promise is charged to avoid the operation of the statute (d), the plaintiff must deny the promise charged by averment in the plea (e), as well as by answer to support the plea (f). Where the domaind is cleary thing executory, as a note for payment of an annuity, or of money at a distant period, or by instalments, the defendant must aver that the cause of action (g) hath not accrued within six years, because the statute bars only as to what was actually due six years before the action brought (h) (2). Upon a bill for discovery of a title, charging fraud, and praying possession, the statute of limitations

d See Andrews v. Brown, Prec. in Cha. 385.

⁽r) Anon. 3 Atk. 70. But this, according to Whithread v. Brock-hurst, 1 Bro. C. C. 404, would be a double plea. (1.)

⁽f) See on this subject, Bayley v. Adams, 6 Ves. 586; 5 Madd. 330; and 1 Sim. & Stu. 6.

⁽g) 2 Strange, 1291.

⁽h) 3 Atk. 71. See above, p. 313, note (z). And see the case of Hony v. Hony, 1 Sim. & Stu. 568, in which the fact of an intermediate acknowledgment of the plaintiff's right having been made, defeated the Blea.

^{(1) [}See Kane v. Bloodgood, 7 J. C. R. 90.] But see p. 312, n.

⁽²⁾ Where a suit for an account of rents and profits has abated before decree by the death of the plaintiff, and a bill of revivor is not filed till a lapse of more than six years from the time of the abatement, a plea of the statute of limitations, 1 Jac. 1, c. 16, will be overruled, if it does not state that six years have elapsed since representation was taken out to the plaintiff. Perry v. Jenkins, 1 My. & C. 118.

alone is not a good plea to the discovery, so far as the charge of fraud extends, for the defendant must answer to the charge of fraud (i), and the plea must put the fraud in issue (1). The statute of limitations may be pleaded to a bill to redeem a mortgage (k) (2) if the mortgagee has been in possession twenty years (l); and indeed a demurrer has been allowed in this case (m) where the possession has appeared upon the face of the bill (n), though some cases seem to be to the contrary (o) (4). To a bill, on an equitable title to

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- (i) Bicknell v. Gough, 3 Atk. 558; 2 Sch. & Lefr. 635.
- (k) On the question whether the statute itself applies to a case of this kind, or whether the rule that twenty years' possession by the mortgagee, subject to the usual exceptions of infancy, &c., without his doing any act which is to be regarded as an acknowledgment that the relation of debtor and creditor still subsists, has been adopted in courts of equity, in conformity with the provisions of the statute, see 1 Cox, R. 149; 2 Sch. & Lefr. 630, 632; 1 Ball & B. 167; thorities there cited.
- 17 Ves. 97, 99; 19 Ves. 184; 2 Jac. & W. 145, 187; and see Blewit v. Thomas, 2 Ves. Jun. 669.
 - (l) Aggas v. Pickerell, 3 Atk. 225; 2 Ves. Jun. 280 (3).
 - (m) 3 P. Wms. 287, note. See also 1 Vern. 418, and Beckford v. Tobin, ab. p. 213, n.; 2 Sch. & Lefr. 638. And see Hodle v. Healey, 1 Ves. & B. 536, and the cases therein cited.
 - (n) Edsell v. Buchanan, 4 Bro. C. C. 254.
 - (o) 3 Atk. 225, 226, and the au-

^{(1) [}And see the decision of Chancellor Walworth, in Bogardus v. Rector, &c., of Trinity Ch. 4 Paige's C. R. 178. There is no limitation in point of time, within which a bill for discovery in aid of an action at law must be filed. Munt v. Scott, 3 Price, 477.]

⁽²⁾ As a foreclosure suit is in substance a suit for the recovery of the money secured by the mortgage, the statute of limitations, 27 Will. IV. c. 27, s. 40, may be pleaded to the bill. Dearman v. Wyche, 9 Sim. 570.

⁽³⁾ And see Elmendorf v. Taylor, 10 Wheat. 152.]

⁽⁴⁾ It was formerly doubted, but now seems to be settled, that defendant may demur on ground of lapse of time, where it appears on the bill, and need not set up that defence by plea. On bill for rents and profits, where it appears on bill the premises have been held adversely by defendant for over 20 years, defendant may demur: To

presentation to a living, seeking to compel the defendant to resign, plenarty for six months before the bill was filed may be pleaded in bar, the statute of Westminster the second (p) being considered for this purpose as a statute of limitation, in bar of an equitable as well as of a legal right (q). But if a quare impedit is brought before the six months are expired, though the bill is filed after, it may be in some cases a ground for the court to interfere (r), and consequently plenarty would not in such cases be pleadable in bar. The statute of limitations may also be pleaded to a bill of revivor, if the proper representative does not proceed within six years after abatement of a suit, provided there has been no decree (s) (1), for a decree being in the nature of a judgment the statute of limitations cannot be applied to it (t). But where the consequence of reviving proceedings to carry a decree into execution would have been to call on representatives to account for assets after a great length of time, and under peculiar circumstances of laches,

(p) 13 Edw. I. c. 5.

(r) 2 P. Wms. 405.

(t) I P. Wms. 744; 2 Sch. & Lefr. 633.

Wms. 404; 3 Atk. 459; Boteler v. Allington, 3 Atk. 453. And see Mutter v. Chanvell, 1 Meriv. 475.

⁽s) Hollingshead's case, 1 P. (q) Gardiner v. Griffith, 2 P. Wms. 742; Comber's case, 1 P. Wms. 766; 2 Sch. & Lefr. 633; 1 Ball & B. 531.

avoid which, if complainant come within any of the exceptions in the statute of limitations, he must state the facts in his bill. Where concurrent remedy exists at law and in equity, time is as absolute a bar to discovery or relief in equity as it would be in a suit at law, in analogy, to the statute of limitations. Humbert et al v. Rector, &c. of Trinity Church, 7 Paige's R. 198, 197, 195. And see Rhode Island v. Massachusetts, 15 Peters, 272. 233.

⁽¹⁾ See note, p. 315.

a bill of revivor and supplement for those purposes was dismissed (u). Although suits in equity are not within the words of the statute, the courts of equity generally adopt it as a positive rule, and apply it by parity of reason to cases not within it (x) (1). In general they also hold that unless

(u) Hercy v. Dinwoody, 4 Bro. C. Atk. 611; 3 Bro. C. C. 340, note; 1 Sch. & Lefr. 428. (2). C. 257.

(x) Lord Mansf. 2 Burr. 961; 2

(1) See Baldwin v. Peach, 1 Y. & C. Eq. Ex. 453, and note, p. 312.

A plea that the tit'e of the plaintiff or of the person through whom there of adverse he claims accrued at a particular time, and that the possession of the specify the cur property and the receipts of the rents and profits thereof have been adverse to him, and the person through whom he claims ever since that time, will be overruled, if it does not set forth the circums' mees constituting such adverse possession; because adverse possession may consist in various things; and if none of these are specified, the plaintiff may have no precise knowledge of the defence which he is to meet. And if a defendant puts in a plea of adverse possession, and the bill specifically charges that the defendant has documents, in his possession which prove certain facts, and such facts, if proved, would tend to negative such adverse possession, the defendant must deny the possession of those documents; and if the bill contains any other statement or charge tending to negative the plea of adverse possession, such statement or charge must be denied. Hardman v. Ellames, 2 M. & K. 732.

But a plea of the statute of limitations need not negative the usual general allegation that the defend int has in his custody doc is need int negaments relating to the matters contained in the bil. Forbes v. Skilon, 8 Sim. 325.

Where a bill contain an allegation of matter which would remove Necessity at an the legal bar of the statute of limitations, if the defendant pleads the swort in support legal bar, without fully negativing that al'egation by an answer, the statute of limits plea will be overruled. Foley v. Hill, 3 Ny. & C. 475.

(2) [The principles of the statute of limitations, as applied to suits in equity, are recognised by the Revised Statutes of the State of New-York. Before such express recognition, they received the same construction and application. Kane v. Bloodgood, 7 J. C. R. 90; Stafford v. Bryan, 1 Paige's C. R. 239; Berline v. Varian, 1 Edwards' V. C.

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the defendant claims the benefit of the statute by plea or answer he cannot insist upon it in bar of

Rep. 343; Bogardus v. Trinity Church, 4 Paige's C. R. 178. Now, it is expressly enacted that bills of relief from fraud are to be brought within six years from the discovery. All other bills for relief, of which law has not cognizance, within ten years after the cause has accrued. There is a sweeping exception of cases connected with disability; and the provisions are qualified so as not to extend to suits over the subject-matter of which a court of equity has peculiar and exclusive jurisdiction, and which is not cognizable at law. 2 R. S. 301; and see the case of Van Hook v. Whitlock, 3 Paige's C. R. 409.

In Kentucky, the construction of the statute of limitations to personal actions in England is not recognised. Patterson v. Brown, 6 Monroe's R. 10; but see the three next cases. The statute of limitations is a bar in equity. M. Dowell v. Heath's executors, 3 A. K. Marshall's (Kentucky) R. 223; Brackenridge v. Churchill, 3 J. J. Marshall's R. 15. It does not apply totidem verbis in equity, but has been adopted as reasonable and consistent. Crain v. Prather, 4 lb. 77. This statute operates as a bar to a suit in equity by its own force, and not by the discretion or courtesy of the court. Farnam v. Brooks, 8 Pickering's (Massachusetts) R. 212. It does not apply to direct trusts resulting from partnerships, agencies and the like. Actual fraud discovered, or which the complainant had means of discovering, more than six years before the commencement of the suit, will not take the case out of the statute. Ib. The statute of limitations receives the same construction, in analogous cases, in equity as at law. Lindsay v. Bell, Finlay's (Irish) Index, 368. And it is a good plea in bar, in equity as well as at law. Ib. When a delay has been such as to be a bar at law, it will be so in equity. Banks v. Judah, 8 Day's (Connecticut) R. 145; and see M'Laren v. Pennington, 1 Paige's C. R. 100. Same principle in the United States courts. Elmendorf v. Taylor, 10 Wheat. 152; Miller v. -M'Intyre, 6 Peters, 61. If equity were to adopt as a general rule, that no lapse of time would preclude its interference, it would introduce a principle that must work infinite mischief to the peace and safety of families. Stratford v. Lord Aldborough, 1 Beatty's (Irish) R. 236. Yet see Ellis v. Deane, 1 lb. 21. A bill filed by one creditor on behalf of himself and the others, will prevent the statute of limitations from running against any of the creditors who come in under the decree. Sterndale v. Hankinson, 1 Sim. 363.

The statute of limitations, notwithstanding it is a defence at law, may be pleaded to a bill of discovery in aid of an action brought, provided it has been pleaded to the declaration. If the action was commenced before the bill was filed, the plea must aver that the cause of

the plaintiff's demand (y); but notwithstanding, the courts will, in cases which will allow of the exercise of discretion, use the statute as a rule to guide that discretion (z); and will also

(y) 1 Atk. 494. (1).

but, in respect of equitable titles and (z) 1 Atk. 494. Courts of equity, demands, are only influenced in their it seems, in respect of legal titles and determination by analogy to it. 1 demands, are bound by the statute, Sch. & Lefr. 428; 2 Sch. &. Lefr. 2 Sch. & Lefr. 630, 631; and see 632; 10 Ves. 466; 15 Ves. 496; 17 Hony v. Hony, 1 Sim. & Stu. 568; Ves. 97; 1 Ball & B. 119, 166; 2

action did not accrue within six years before the action was brought. Macgregor v. The E. I. Company, 2 Sim. 452. It is a settled principle that equity follow the law; and acting in obedience to the statute of limitations, the plea thereof is as available in equity as at law, in relation to the same subject-matter. Watkins v. Harwood, 2 Gill & Johns. 307; Corroll v. Waring, 3 lb. 491. That is, where, as between individuals at law, it would have been a bar; and if the fact is on the bill, and no circumstances stated to take it out of the operation of the act, defendant is not bound to plead or answer, but may demur. Rhode Island v. Massachusetts, 15 Peters, 272, 233; Coulson v. Watson, 9 Id. 62.

The law of courts of equity, or rule adopted independently of any positive legislative limitations, is, that it will not entertain stale demands. Piatt v. Vattier, 9 Peters, 415, 416. The rule on this subject must be considered as settled in that case, and nothing can call a court of chancery into activity, but conscience, go d faith and reasonable diligence. McKnight v. Taylor, 1 Howard, R. 161. 167-8; Bowman v. Wathen, Id. 189. 193-4.

Every new right of action in equity, that accrues to a party, whatever it may be, must be acted upon at the utmost within 20 years. Ibid. This is laid down by Lord Redesdale, 2 Sch. & Lef. 636); as the common law of courts of equity. Ibid. 1 How. 193-4. 189. The statute of limitations may be interposed against legacies, if not charged upon the land, as well in equity as at law. Souzer v. De Meyer, 2 Paige's C. R. 574.

If a sufficient lapse of time to create a bar appears upon the bill, there is no occasion to support such a plea with an answer. Carroll v. Waring, 3 Gill & Johns. (Maryland) R. 491.. The statute of limitations may be a bar to a suit in equity by one partner against another for an account and settlement of the joint concern. Atwater v. Fowler, 1 Edwards' V. C. R. 417.]

(1) [Dey v. Dunnam, 2 J. C. R. 191; 3 J. J. Marshall's R. 186.]

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sometimes resort to the policy of the ancient law, which in many cases limited the demand of accruing profits to the commencement of the suit (a).

Plea of some other statute, whether general or particular.

Any other public statute which may be a bar to the demands of the plaintiff may be pleaded, with the averments necessary to bring the case of the defendant within the statute, and to avoid any equity which may be set up against the bar created by the statute (b).

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A particular statute may also be pleaded in the same manner. Thus, to a bill impeaching a sale of lands in the fens by the conservators under the statutes for draining the fens, the defendant pleaded the statutes, and that the sale was made by virtue of and according to those statutes, and the plea was allowed (c).

X. Plea of an equal right in the protection of the court;

X. Supposing a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interpose on either side (d). This is par-

particularly p. 175, and 2 Jac. & W.

(a) On this subject see Pulteney, v. Warren, 6 Ves. 73; Pettiward v. Prescott, 7 Ves. 541.

(b) See instances of a plea of the statute of maintenance, 32 Hen. VIII. c. 9, s. 3, Hitchins v. Lander, Coop. R. 34; Wall v. Stubbs, 2 Ves.

Jac. & W. 163, and following pages, & Bea. 354; and another example of the proposition in the text, Ocklestone v. Benson, 2 Sim. & Stu. 265. And see De Tastet v. Sharpe, 3 Madd. 51.

> (c) Brown v. Hamond, 2 Ch. Ca. 249.

(d) (1) See 2 Ves. Jun. 457,458, and the authorities there referred to;

⁽¹⁾ See the form of such a plea, Willis, 566.]

ticularly the case where the defendant claims under as in the case of a purchase or a purchase or mortgage for valuable consideration mortgage for valuable consideration valuable consideration. without notice of the plaintiff's title, which he may notice. plead in bar of the suit (e) (1). Such a plea must [275] aver that the person who conveyed or mortgaged to the defendant was seised in fee, or pretended to be seised (f)(3), and was in possession (g), if the

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been made in favor of a dowress, see 303. (2). Williams v. Lambe, 3 Bro. C. C. & Coll. 457; Wood v. Mann, 2 250. Sumuer C. C. Rep. 507, 508.

(e) Fitzgerald v. Burk, 2 Atk. 397; Story v. Lord Windsor, 2 Atk. 630; Bullock v. Sadler, Ambl.

and see the case of Gait v. Osbal- 763; Strode v. Blackbourne, 3 Ves. deston, 5 Madd. 428; S. C. 1 Russ. 222; Wallwyn v Lee, 9 Ves. 24; R. 158. One exception has however 1 Ball & B. 171; 2 Ball & B.

- (f) 3 P. Wms. 281; Story " 264; Payne v. Compton, 2 Younge Lord Windsor, 2 Atk. 630; 17 Ves.
 - (g) Trevanuan v. Mosse, 1 Varn. 246; 3 Ves. 226; 9 Ves. 32; 16 Ves. 252.

(2) The consideration of marriage will support a plea of purchase for valuable consideration, without notice, equally with a price paid in money. Jackson v. Rowe, 2 S. & S. 472.

A plea of a purchase for valuable consideration, without notice, is no protection against an adverse title which would have become known to the purchaser, if he had used reasonable diligence in the investigation of the title. Ib.

(3) A plea of a purchase for valuable consideration without notice must show that if the vendor or settlor had not a good title, the party purchasing was imposed on at the time of his purchase. And hence if a plea of this kind is put in by the heir at law of one who became a purchaser of his wife's estate for a valuable consideration or under a prenuptial settlement, the plea must aver that the wife was seised, or

⁽¹⁾ It is not sufficient for a defendant claiming to be a bina fide purchaser for valuable consideration without notice, to deny personal knowledge of the matters charged, without denying notice, before his contract. He must deny notice, even though it be not charged; and he must deny it positively, and not evasively; he must even deny it fully, and, in the most precise terms, every circumstance from which notice could be inferred. Wilson v. Hillyer and Dunn, Saxton's (N. J.) Ch. R. 63. Gordon v. Rockafellow. Opinion of Ch. Williamson, see Halsted's Dig., 2d Ed. vol. 1, p. 226.

conveyance purported an immediate transfer of the possession at the time when he executed the purchase or mortgage-deed (h). It must aver a conveyance, and not articles merely (i); for if there are articles only, and the defendant is injured, he may sue at law upon the covenants in the articles (k). It must aver the consideration (l) and actual payment of it; a consideration secured to be paid is not sufficient (m). The plea must also deny notice (n) of the plaintiff's title or claim (n), previous to the execution of the deeds and payment of the consideration (n); and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a

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- (h) 3 P. Wms. 281. As to the case where the purchase is of a reversion, see *Hughes* v. *Garth*, Ambl. 421; S. C. 2 Eden R. 168.
- (i), Fitzgerald v. Lord Falconbridge, Fitzg. 207; 1 Atk. 571; 3 Atk. 377.
 - (k) 1 Atk. 571.
- (l) 1 Ca. in Cha. 34; Millard's Case, 2 Freem. 43; Brereton v. Gamul, 2 Atk. 240.
- (m) Hardingham v. Nicholls, 3 Atk. 304; Maitland v. Wilson, 3

Atk. 814.

- (n) On the subject of notice, actual and constructive, see Sugden's Ven. & Purch. 6th ed. 710.
- (o) Lady Bodmin v. Vandebendy, 1 Vern. 179; Jones v. Thomas, 3 P. Wms. 243; Kelsall v. Bennet, 1 Atk. 522.
- (p) More v. Mayhow, 1 Ca. in Cha.
 34; S. C. 2 Freem. 175; 1 Eq. Ca.
 Ab. 38, 334; Tourville v. Naish, 3
 P. Wms. 307; 1 Atk. 384; 2 Atk.
 631; 3 Atk. 304.

pretended to be seised, not only before, but at the respective times of the execution of the marriage settlement and of the marriage. Jackson v. Rowe, 4 Russ. 514. In this case, however, where the words "and at" were omitted after the word "before," by a mere slip, Lord Lyndhurst, C., allowed the plea to be amended by inserting them, subject to the making of an affidavit of that fact, if required by the plaintiff. As to the plea of purchase for valuable consideration without notice, see further Jewett v. Palmer, 7 J. C. R. 65; High v. Battle, 10 Yerger's (Tenn.) R. 385; 1 Hoff. Ch. R. 153, 163; Flagg v. Mann, 2 Sumner's C. C. R. 557; Donnell v. King, 7 Leigh's (Va.) Rep. 393; Snelgrove v. Snelgrove, 4 Desaus. Eq. R. (So. Ca.) 287.

person who could claim under that title (q). If particular instances of notice, or circumstances of fraud are charged, they must be denied as specially and particularly as charged in the bill (r). The special and particular denial of notice or fraud must be by way of answer, that the plaintiff may be at liberty to except to its sufficiency (s); but notice and fraud must also be denied generally by way of averment in the plea, otherwise the fact of notice or of fraud will not be in issue (t). Notice or fraud [277] thus put in issue, if proved, will effectually open the plea on the hearing of the cause.

- y I M. 522. And I must not appear that the defendant, though he should claim as purchaser under a settlement executed at the time of his marriage, might have had notice of the plaintiff's title by using due diligence in the investigation of hisown ; Jackson v. Rowe, 2 Sim. & Stu. 472; and see Hamilton v. Royse, 2 Schr & Lefr. 315; 13 Ves. 120; 14 Ves. 433; 6 Dow. P. C. 223, 224; 6 Madd. 59.
- (r) Radford v. Wilson, 3 Atk. 815; 2 Ves. 450; Jarrard v. Saunders, 2 Ves. Jun. 187; S. C. 4 Bro. C. C. 322.
- S. Aror Com Chuldt: Page v. Price, 1 Vern. 125; 6 Ves. 596; 14 Ves. 66. It has been lately declared, that it is not the office of the plea to deny particular facts of notice; but that it is sufficient, where such facts are alleged, to make a general denial which will include constructive as well as actual notice: yet that if circumstances be specially charged as evidence of notice, they must be denied by averments in the plea, and by an answer accompanying the same. Ponnington v. Beechy, 2 Sim. & Stu. 282 (1).
 - (t) Harris v. Ingledew, 3 P. Wms.
- (1) Mr. Justice Story in the third edition of his Equity Pleading, p. 804, makes the following remark in reference to this note of Mr. Jeremy: "I do not understand the vice-chancellor in that case to have held, that the special matters, charged as evidence, should be specially denied by averments in the plea as well as in the answer; but only that to require an answer to accompany the plea, the matters should be specially charged in the bill; and should also be specially charged as evidence of notice of the title of the plaintiff. See on this last point, the remarks of Mr. Wigram, in his points of discovery, 169-181, 1st Ed. Id. 142-171. Id. 185, 186, 2d Ed. See also Phelps v. Sproule, 1 Myl. & Keen, 231; Cork v. Wilcock, 5 Madd. R. 328, on the same point."

[278] A purchaser with notice, of a purchaser without

94; 3 P. Wms. 244, note. Gilb. For. Rom. 58; Treat. of Frauds, c. 18, p. 220. In the case of Meadows v. Duch. of Kingston, Mich. 1777, (S. C. reported Ambl. 756,) the Chancellor seemed to be of opinion, that notice and fraud were to be denied by way of averment in the plea, in cases only where the denial made part of an equitable defence; as in a plea of purchase for valuable consideration, the denial of notice must be by way of averment in the plea, because the want of notice creates the equitable bar. But in Devie and Chester, in Chan. March 10th, 1780, a decree establishing a modus having been pleaded to a bill for tithes, in which the plaintiff stated that the defendants set up the decree as a bar to his claim, and to avoid the effect of the decree charged that it had been obtained by collusion, and stated facts tending to show collusion; the Chancellor was of opinion, that the defendants not having by averments in the plea denied the collusion, although they had done so by answer in support of the plea, the plea was bad in form, and he overruled it accordingly. And in Hoare and Parker, in Ch 17th and 19th of Jan. 1785, (reported 1 Bro. C. C. 578; S. C. 1 Cox, R. 244,) the plaintiffs having brought their bilf as trustees, claiming quantities of plate described in a schedule annexed to the bill, of which the use

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had been given by the will of Admiral Stewart to his widow for her life, and after her death to his son and his issue; against the defendant, a pawnbroker, with whom the plate, or part of it, was alleged to have been pledged by the widow; and the bill having sought a discovery of the particular pieces of plate pawned, in order to found an action of trover, the defendant pleaded to so much of the bill as sought a discovery of the plate pawned, as after mentioned in the plea, and of the plate specified in the schedule annexed to the bill, that Mrs. Stewart had pledged divers articles of plate at several times stated in the plea, for sums of money specified in the plea, which sums the defendant averred were paid to Mrs. Stewart; and he also averred that he had no notice of the will of Admirál Stewart till after the death of Mrs. Stewart: but he did not aver by his plea that he had no plate pawned with him by Mrs. Stewart besides the pieces pawned at the particular times mentioned in the plea, although he did by his answer deny that he had any other. The chancellor was of opinion that the plea was therefore defective in point of form, as it extended to all the plate mentioned in the schedule of which a discovery was sought by the bill. See 6 Ves. 595, 597; and see p. 280, et seq. (1)

^{(1) [}Souzer v. De Meyer, 2 Paige's C. R. 574. Lord Chancellor Lifford, (in Lord Drogheda v. Malone, Finlay's Digest, 449) has thus illustrated a plea of valuable consideration; "with respect to purchasers for valuable consideration, the early cases were crude and not sufficiently guarded, but it is now established, that such a purchaser, "without notice, shall protect himself from relief and discovery by this

notice, may shelter himself under the first purchaser (t). But notice to an agent is notice to the principal (u); and where a person having notice purchased in the name of another who had no notice, and knew nothing of the purchase, but afterwards approved it, and without notice paid the pur-

(t) Brandlyn v. Ord, 1 Atk. 571; 329; Jackson v. McChesney, 7 Cow-Lowther v. Carlton, 2 Atk. 139; en's R. 360. Harrison v. Forth, Prec. in Cha. 51; Madd. 34. Varick v. Briggs, 6 Paige's Ch. Rep.

S. C. 2 Atk. 242; Ca. t. T. lb. 187; (u) Brotherton v. Hatt, 2 Vern. 2 Eq. Ca. Ab. 685; Sweet v. South- 574; Le Neve v. Le Neve, 3 Atk. cote, 2 Bro. C C. 66; Ambl. 313; 646; 1 Ves. 62; 2 Ves 62, 370; 13 11 Ves. 478; 13 Ves. 120; and see Ves. 120; Mountford v. Scott, 3

"sort of plea; and upon this principle, that all men who stand on equal " ground shall have equal equity, because the court cannot do anything "for one, without injuring the other. No title can be better than the "title of such a purchaser: particularly where the consideration is "marriage. If he has a legal title, the court cannot interpose. Several "circumstances are now required to substantiate this sort of plea, " which, at first, were not attended to. I. That the party with whom " such purchaser has dealt, should be seised, or pretended to be seised, in "fee and this must be averred. 1 Vern. 246. II. That he is the visible "and reputed owner. III. That the purchaser shall purchase for valu-"able consideration. There are two sorts of valuable consideration: 1. "Money; 2. Marriage. With respect to money-it ought to be paid "at the time. With respect to marriage-it is certainly a valuable "consideration, and the moment the marriage is celebrated, the con-" sideration is paid. IV. That there shall be no notice express or im-" plied of any fraud committed by the person with whom the purchaser "deals. He must show that he has been diligent, and then he will "appear innocent and may protect himself. The great end of equity "and all institutions of justice is to make property safe and to render "it secure. If a purchaser has notice, he throws away his money "wilfully. 1 Atk. He acts contrary to good conscience, for he ought "not to interfere with any man's right: these circumstances should all "concur. As to pleas in general: 1. A plea must be such as not to " cover too much, and this sort of plea particularly should not cover "more than the purchase for valuable consideration covers. With "respect to all such overplus it is bad: it cannot cover any fraud in "the purchaser himself, &c., &c."]

chase-money, and procured a conveyance, the person first contracting was considered from the beginning as the agent of the actual purchaser, who was therefore held affected with notice (x). A settlement in consideration of marriage is equivalent to a purchase for a valuable consideration (y), and may be pleaded in the same manner (z). If a settlement is made after marriage in pursuance of an agreement before marriage, the agreement as well as the settlement must be shown (z). A widow, defendant to a suit brought by any person claiming under her husband, to discover her title to lands of which she is in possession as her jointure, may plead her settlement in bar to any discovery, unless the plaintiff offers, and is able, to confirm her jointure. But a plea of this nature must set forth the settlement, and the lands comprised in it, with sufficient certainty (a). A plea of purchase for a valuable consideration protects a defendant from giving any answer to a title set up by the plaintiff, but a plea of bare title only, without setting forth any consideration, is not sufficient for that purpose (b). Upon a plea of purchase for a valuable consideration to a discovery of deeds and writings, the purchase-deed must be excepted, for it is pleaded (c).

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⁽x) Jennings v. Moore, 2 Vern. 609; S. C. on appeal under title Blenkarne v. Jennens, 2 Bro. C. C. 278, Toml. Ed.; Coote v. Mammon, 5 Bro. P. C. 355, Toml. Ed.

⁽y) 1 Atk. 190; 6 Ves. 659; 18 Ves. 92; 6 Dow P. C. 209; 2 Sim. & Stu. 475.

⁽z) Harding v. Hardrett, Finch, R. 9.

⁽z) Lord Keeper. v. Wyld, 1 Vern.

⁽a) Petre v. Petre, 3 Atk. 511; 3 Atk. 571; 2 Ves. 450; Leech v. Trollop, 2 Ves. 662. As to the case of a dawress plaintiff, see above, p 319, note (d). 1 Ves. Jun. 76.

⁽b) 2 Atk. 241.

⁽c) 2 Ves. 107.

A plea of purchase for a valuable consideration without notice of the plaintiff's title to a bill to perpetuate the testimony of witnesses, has been allowed, though there are few cases in which the court will not give that assistance to the furtherance of justice. Thus, to a bill to perpetuate the testimony of witnesses to a will the defendant pleaded purchase for a valuable consideration, without notice of the will, and the plea was allowed (c) (1). But in this case, as reported, there appears to have been nothing to impede the plaintiff's proceeding at law to assert his title under the will, against the defendant's possession, and there was apparently therefore no equity to support the bill (d).

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XI. Though a plaintiff may be fully entitled to XI. Pleast want the relief he prays, and the defendant may have no claim to the protection of the court which ought to prevent its interference, yet the defendant may object to the bill if it is deficient to answer the purposes of complete justice. This is usually for want of proper parties; and if the defect is not apparent on the face of the bill (e), the defendant may plead the matter necessary to show it

⁽c) Bechinal v. Arnold, 1 Vern. P. C. 362, Toml. Ed.; 2 Ves. Jun. 354. 458.

⁽d) See also Ross v. Close, 5 Bro. (e) 16 Ves. 325.

⁽¹⁾ The question sometimes arises as to who is to be treated as a bonû fide purchaser in the sense of the rule; and it has been held that a judgment creditor by elegit is not entitled to be deemed such; but he takes only such rights in the premises as the judgment debtor rightfully possessed. Thus, for example, a judgment creditor cannot hold an estate subject to an equitable mortgage, by an elegit executed on the estate of the debtor mortgagor, except subject to such equitable mortgage, although he had no notice of the mortgage at the time of the elegit. 3 Hare's Rep. 416; 2 Story's Eq. Juris. §. 1503.

- (f) (1). A plea of want of parties goes both to discovery and relief where relief is prayed (g), though the want of parties is no objection to a bill
- (f) Hanne v. Stevens, 1 Vern. (g) 2 Atk. 51, in Plunket v. Pen-110; Ashurst v. Eyre, 2 Atk. 51; son, wherein this plea is termed a S. C. 3 Atk. 341. plea in bar; but see 6 Ves. 594; 16 Ves. 325.

(1) [Mitchell v. Lenox, 2 Paige's C. R. 280; M'Kinley v. Combe, 1 Mon. 107; West v. Saunders, 1 Marsh. 110. See the form of a plea for want of parties, Willis, 571, and see note there; Edwards on Parties, 292.]

A plea for want of parties must be to the entire bill. *Parke* v. *Black*, 1 Hogan, 70; and see the cases, which appeared to make the practice doubtful, there reviewed.

Where a plea is put in for want of parties, on the ground that certain persons not named parties claimed adversely, such persons alleging certain facts as the ground of their claim; and the plea does not state that those facts are true, but, by admitting the statements in the bill, admits indeed that those facts are falsely alleged, it cannot be sustained. Birch v. Gough, 3 Jur. 769, V. C. E.

Where a lill is filed in respect of a legacy given to a class of children, to vest at twenty-one or marriage, a plea that the representative of a deceased child is a necessary party, will be overruled, if it does not show that such child had attained a vested interest. Overton v. Banister, 4 Beav. 205.

A plea that an equitable mortgagee by deposit of title deeds is not a party, will be overruled, if it does not state with whom they were deposited, but only leads to an inference that they were deposited with a certain person; for if this person were made a party, the defendant might again object that some other person in whose hands the deeds then were, is a necessary party. Henley v. Stone, 4 Beav. 389.

A second plea for want of parties is allowable, where by an amendment of the bill subsequent to the first plea, the plaintiff brings forward additional matter which shows that the persons mentioned in the second plea are necessary parties, in addition to those mentioned in the first plea. *Henley v. Stone*, 4 Beav. 389.

Where a bill seeks a discovery whether there are any incumbrancers, and who they are, the very nature of the bill precludes the defendant from pleading to the bill, on account of those incumrancers not being made parties. Rawlins v. Dalton, 3 Y. & C. Eq. Ex. 447.

for a discovery merely (h). Where a sufficient reason to excuse the defect is suggested by the bill, as where a personal representative is a necessary party, and the bill states that the representation is in contest in the ecclesiastical court (i), or where the party is resident out of the jurisdiction of the court (k), and the bill charges that fact, or where a bill seeks a discovery of the necessary parties (1), an objection for want of parties will not be allowed, unless, perhaps, the defendant should controvert the excuse made by the bill by pleading matter to show it false (1). Thus, in the first instance, if before the filing of the bill the contest in the ecclesiastical court was determined, and administration granted, and the defendant showed this by plea, perhaps the objection for want of parties would be in strictness good. Upon arguing a plea of this kind, the court, instead of allowing it, has given the plaintiff leave to amend the bill upon payment of costs (m) (3); a liberty which he may

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⁽h) Sangosa v. E. I. Comp. 2 Eq.Ca. Ab. 170.

⁽i) See 2 Atk. 51, in Plunket v. Penson.

⁽k) Cowslad v. Cely, Prec. in Cha. 83; and see Haddock v. Thomlinson, 2 Sim. & Stu. 219, and above, p. 191, note.

⁽¹⁾ See Bowyer v. Covert, 1 Vern. 95.

⁽m) Stafford v. City of London, 1 P. Wms. 428; and where the plea was defective in point of form, in not stating that additional parties were necessary, and naming them, leave was given to amend the plea. Merrewether v. Mellish, 13 Ves. 435. See 11 Ves. 369; 16 Ves. 325 (2).

^{(1) [}Milligan v. Milledge, 3 Cranch, 220.]

^{(2) [}It seems, that leave will not be given to amend a plea, unless the court is satisfied the defect, which the amendment is intended to remedy, arose from an accidental slip. And even in such a case an affidavit will be required, provided the opposite party require it. Jackson v. Rowe, 4 Russ. 514.]

^{(3) [}Cook v. Mancius, 3 J. C. R. 427.]

also obtain after allowance of a plea, according to the common course of the court; for the suit is not determined by allowance of a plea as it is by allowance of a demurrer to the whole of a bill (n).

Pleas to disco-

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Having thus considered all the objections to a bill which have occurred, as extending to relief, and which likewise extend to discovery (1) wherever it is merely sought for the purpose of obtaining relief, and can have no other end, it remains to treat of such objections as are grounds of plea to discovery only. These are nearly the same as those which have been already mentioned as causes of demurrer to discovery. They may be, I. That the plaintiff's case is not such as entitles a court of equity to assume a jurisdiction to compel a discovery in his favor; II. That the plaintiff has no interest in the subject, or no interest which entitles him to call on the defendant for a discovery; III. That the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him even for the purpose of discovery only; IV. That the situation of the defendant renders it improper for a court of equity to compel a discovery (2).

(n) See below, original page [304].

(1) The statute of limitations may be pleaded to a bill of dis-

Plea to discovery as well as relief.

⁽¹⁾ Where a bill alleges the plaintiff's title to an estate, and prays an account of the rents and a discovery of documents, and the defendant pleads, in bar to the relief, that he is the party entitled, and pleads to so much of the discovery as requires an account of the rents and a discovery of documents relating to the rents, and in his answer sets forth a list of all documents except such as relate exclusively to the rents, his plea will be overruled: for such documents may contain information which may go to prove the plaintiff's title. Rigby v. Rigby, 10 Jur. 126, V. C. E.

- I. If the plaintiff's case is not such as entitles 1. Plea of want a court of equity to assume a jurisdiction to compel a discovery in his favour, though he falsely states a different case by his bill, so that it is not liable to a demurrer, the defendant may by plea state the matter necessary to show the truth to the court (n) (1).
- rupt, in a bill filed by him to obtain discovery in aid of his defence to an action, and fer an account, and an injunction in the mean time, should avoid stating his bankruptcy, although this court, it seems, would not afford him relief by decreeing the

(n) But if a plaintiff who is bank- payment of the balance to him, it would overrule a plea of that fact so far as to give him the discovery, and even to have the accounts taken. Loundes v. Taylor, 1 Madd. R. 423; S. C. 2 Rose, 365. See above. p. 81, note.

covery in aid of an action of assumpsit, provided it has been Plea of statute pleaded to the action. Macgregor v. East India Company, 2 Sim. a bill of discor-452.

ery maid of an

And such a plea need not deny the usual allegation as to books sumpert, and papers in the possession or power of the defendant, from which the truth of the matters in the bill would appear, unless there is an allegation or charge that there has been a promise or acknowledgment evidenced by a writing within six years. Ib.

The statute of limitations may also be p'eaded to a bill of discovery or ejectment. in aid of an action of ejectment. Scott v. Bradwood, 2 Coll. 447.

Where a bill of discovery is filed in aid of a plea to an action for Plea to a bill of libel, pending a demurrer at law to that plea, and the defendant in of a plea to an equity puts in a plea to the bill, stating the pendency of such demurrer at law, and averring the invalidity of such plea at law; the plea to the bill will be allowed, notwithstanding the possibility that the court of law may allow the plea at law to be amended; for, in such case, there is no actual proceeding at law in which the discovery, if obtained, can be used. Stewart v. Lord Nugent, 1 Keen, 201.

A plea that an action for libel has been discontinued and is at an plea of the disend, is no defence to a bill for a discovery and commission in aid of a continuous of plea of justification to the action, inasmuch as the defendant in equity which a last of might commence another action. But upon the defendant afterwards discourged ed undertaking not to bring any other action, and to pay the costs of the suit, all further proceedings will be stayed. Wilmot v. Maccabe, 4 Sim. 263.

(1) [For the form of a plea to the jurisdiction, where a discovery is sought in a.d of another court of competent jurisdiction, see Willis, 574.1

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II. Plea of want of interest in the plaintiff or of right to sue.

II. If a plaintiff by his bill states himself to have an interest which entitles him to call on the defendant for a discovery, though in truth he has no such interest, the defendant may by plea protect himself from making the discovery, which may involve him in difficulty and expense, and perhaps may be prejudicial to him in other cases (1). Thus, if a plaintiff states himself to be heir or administrator of a person dead intestate, and in that character seeks a discovery from a person in possession of property which did belong to the deceased, of his title thereto, or of the particulars of which it consists, the defendant may plead that another person is heir or personal representative, or that the person alleged to be dead is living (o) (2).

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III. Plea of want of interest in the defendant.

III. It has been already observed, that if a claim of interest is alleged by a bill against a person who

(o) Ord v. Williamson, Trin. 1773; see Gait v. Osbaldeston, 1 Russ. Ord v. Huddlestone, Dick. 510. And 158; S. C. 5 Madd. 428.

Bill making officers of a corporation co-defendants.

The role that officers of a corporation may be made co-defendants with the corporation, applies to a bill of discovery as well as to a bill for relief. Glascott v. The Governor and Company of the Copper Miners of England, 11 Sim. 305.

(2) [If a party having an.interest, joins, as a co-plaintiff, a party having no interest, a plea will be a good defence to the suit, if the fact does not appear on the face of the bill (and if it does appear, a demurrer will hold.) Makepeace v. Haythorne, 4 Russ. 244.]

⁽¹⁾ Mendizabel v. Machado, 1 Sim. 68. [But, to a bill by several tenants in common of an estate within the Island of Jamaica against their co-tenant, for an account of the profits, &c.—it was held as not sufficient for the defendant to plead that the title to the estate might be brought in question and suggesting that he had an exclusive title to the whole and ought not, therefore, to be sued in chancery. He ought to have set forth his title affirmatively, that the court might have determined whether the suit ought to have been stayed until the title was established. Livingston v. Livingston, 3 J. C. R. 51.]

has, no interest in the subject, he cannot by demurrer protect himself from a discovery, and must resort either to a plea or disclaimer (p)(1); by either of which means it should seem he may protect himself from making by answer that discovery which he may properly be required to make if called upon as a witness (q). In some cases however the court has allowed a defendant to protect himself by answer, denying the charge of interest, from answering to matters to which he may be afterwards called upon to answer in the character of a witness; and perhaps, in justice to those against whom he may afterwards be called upon to give evidence as a witness, he ought not to be previously examined to the same matters upon a bill, under the pretence of an interest which he has not.

IV. The situation of a defendant may render it discovery would be improper. improper for a court of equity to compel a discovery, 1, because the discovery may subject him to pains and penalties; 2, because it will subject him to a forfeiture, or something in the nature of a forfeiture; 3, because it would betray the confidence reposed in him as a counsel, attorney, or arbitra-

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⁽p) Page 223. And see 1 Ves. settled that a bankrupt could by plea protect himself from discovery. See 426.

⁽q) But it does not appear to be 1 Ves. & B. 550 (2).

^{(1) [}By the practice of the State of New-York, a party who disclaims in a mortgage case will have to pay costs. Rule 133.]

⁽²⁾ See supra, pp. 187, 188. But see Griffin v. Archer, 2 Anst.

To a bill for the delivery up of bills of exchange which the plaintiff had been fraudulently induced by the drawer to accept without a dant, in aut for consideration, the drawer cannot plead that he has b come bankrupt bills of ex since the filing of the bill. Mackworth v. Marshall, 3 Sim. 368; [and change see Willis on Eq. Plead. 266, and note (a) there.]

tor; 4, because he is a purchaser for a valuable consideration without notice of the plaintiff's title.

1. Plea that the discovery would subject the de-fendant to punishment, or any thing in the na-ture of punishment.

I. It has been already observed, that no person is bound to answer so as to subject himself to punishment, in whatever manner that punishment arises, or whatever is the nature of the punishment (r). If therefore a bill requires an answer which may subject the defendant to any pains and penalties (1), or tends to accuse him of any crime, and this is not so apparent upon the face of the bill that the defendant can demur, he may by plea set forth by what means he may be liable to punishment, and insist he is not bound to answer the bill. or so much thereof as the plea will cover (s) (2).

Thus to a bill brought for discovery of a marriage,

(r) Page 229. See 2 Ves. 245; 109; Claridge v. Hoare, 14 Ves. 59; 2 Swanst. 214, 216; Bird v. Hardwicke, 1 Vern. 109; 11 Ves. 525.

Maccullum v. Turton, 2 Younge & Jervis, 183, 186; Hare on Discovery,

(s) Bird v. Hardwicke, 1 Vern. 131-156.

Plea of exposure to a penal-

(1) If the interval between the filing and the arguing of a plea that the discovery sought would expose the defendant to a penalty, the period elapses within which the penalty can be sued for, the plea will be overruled. The Corporation of Trinity House Strond v. Burge, 7 Law J. (O. S.) 44, V. C.

Where a tenant undertakes to pay an additional rent, in case he shall do or not do certain acts, though such additional rent be in some passages of the lease designated a penalty, it is not considered as a penalty so as to protect the tenant from answering to a bill of discovery as to such acts. Jones v. Green, 3 Y. & J. 290.

(2) [But if, between the filing and the hearing of the plea, the time for suing for the penalties expires, the plea will be overruled. Corporation of Trinity Church v. Burge, 2 Sim. 411. See the form of a plea that the discovery will subject the defendant to pains and penalties, Willis, 577; also the form of the plea used in Claridge v. Hoare. supra.] Beames' Pleas in Equity, Appendix 333-6, being the actual plea in Hutchins v. Landar, Cooper's Eq. Pl. 34, allowed by Lord Eldon.

where the fact, if true, would have subjected the party to punishment in the ecclesiastical court for incest, the defendant pleaded matter to show that the marriage, if real, was incestuous, and would subject the parties to pains and penalties (t). And where a bill was brought against a woman claiming as widow of a person dead, alleging that before her marriage with the deceased she was married to another person, who was living at the time of her marriage with the deceased, the defendant pleaded that marriage to the discovery of the supposed first marriage, and insisted that she was not compellable to answer to the fact of the first marriage, as it would tend to show her guilty of bigamy (u). So to a bill for a discovery whether the defendant had become a purchaser of an estate of which the supposed seller was not in possession, the defendant pleaded the statute against selling or contracting for any pretended rights or titles (x). And to a bill brought by insurers for a discovery of what goods had been shipped on board a vessel, the defendant pleaded the statutes which made it penal to export wool. He was, however, directed to answer so far as to discover what goods were on board the vessel besides wool (y). But where the discovery sought was not of a fact which could subject the defendant to any penalty, though connected with another fact which might, as, where the question was whether the defendant had a legitimate son, the defendant was compelled to answer.

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⁽t) Brownsword v. Edwards, 2 (x) Sharp v. Carter, 3 P. Wms. Ves. 243; 14 Ves. 65. 375.

⁽u) 5 Bro. P. C. 102, Toml. Ed. (y) Duncalf v. Blake, 1 Atk. 52.

For the discovery of that fact would not subject him to a penalty, though the discovery of his marriage with the mother of the son might, and therefore he was not compelled to discover the marriage (z).

2. Plea that the discovery would subject the defendant to a forfeiture.

2. It has been also (a) observed, that no person is bound to answer so as to subject himself to any forfeiture, or to any thing in the nature of a forfeiture (b). If this is not apparent on the bill, the defence must be made by way of plea. Thus where a bill was brought to discover whether the defendant had assigned a lease, he pleaded to the discovery a proviso in the lease, making it void in case of assignment (c). And to a bill seeking a discovery whether a person under whom the defendant claimed was a papist, the defendant pleaded his title, and the statute of 11 & 12 Will. III. disabling papists (d) (1). But such a plea will only bar the discovery of the fact which would occasion a forfeiture. Therefore, where a tenant for life pleaded to a bill for discovery whether he was tenant for life or not, that he had made a lease for the life of another, which, if he was tenant for his own life only, might occasion a forfeiture, the plea was overruled (c). So upon a bill charging the defendant to be tenant for life, and that he had committed waste, it was determined that he might plead

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⁽z) Finch v. Finch, 2 Ves. 491.

⁽a) Page 233.

⁽b) 1 Atk. 527. And see Parkhurst v. Lowten, 1 Meriv. 391.

⁽c) Fane v. Atlee, 1 Eq. Ca. Ab. 77. (d) Smith v. Read, 1 Atk. 526;

³ Atk. 457; Jones v. Meredith, Com. R. 661; S. C. Bunb. 346; Harrison

v. Southcote, 528; S. C. 2 Ves. 389. . (e) Weaver v. Earl of Meath, 2 Ves. 108.

⁽¹⁾ The disabilities of papists from holding property are removed by the stat. 10 Geo. IV. c. 7, s. 23.

to the discovery of the act which would occasion the forfeiture, the waste, but that he could not plead to the discovery whether he was tenant for life or not (f). Upon an information by the attorneygeneral on behalf of the crown, to discover whether the defendant was an alien, and whether her child was an alien, and where born, it was held the defendant was bound to discover whether she was herself an alien, the legal disability of an alien not being a penalty or forfeiture; and that she was also bound to discover whether her child was an alien, and where born, as she had a chattel interest in the property in question in trust, eventually, for the crown, if her child was an alien (g). all cases of forfeiture, if the plaintiff is entitled alone to the benefit of the forfeiture (h), and waives it by his bill, the defendant will be compelled to make the discovery required. And though the plaintiff is not entitled to the benefit of the forfeiture, yet if the defendant has by his own agreement bound himself not to insist on being protected from making the discovery, the court will compel him to make it (i). In some cases the legislature has expressly provided that the parties to transactions made illegal by statute shall be compellable to answer bills in equity for discovery of such transactions; and in such cases a defendant cannot protect himself from making the discovery thus required by pleading the statute which may subject

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⁽f) 2 Ves. 109.

⁽g) Att. Gen. v. Duplessis, Parker, Ab. 77. 144; S. C. 1 Bro. P. C. 415; Daubigny v. Davallon, Anstr. 462.

⁽h) South Sea Comp. v. Bump-

stead, Mosely, 75; S. C. 1 Eq. Ca. Ab. 77.

⁽i) Mosely, 77, and the cases there cited; African Comp. v. Parish, 2Vern. 244.

him to penalties in consequence of the discovery (k).

- 3. Plea, that the defendant's knowledge was derived as counsel, attorney, or arbitrator.
- 3. If a bill seeks a discovery of a fact from one whose knowledge of the fact was derived from the confidence reposed in him as counsel, attorney, or arbitrator, he may plead in bar of the discovery that his knowledge of the fact was so obtained (l) (1).
- Plea of purchase for a valuable consideration.
- 4. If a defendant is a purchaser for a valuable consideration without notice of the plaintiff's title, a court of equity will not in general compel him to make any discovery which may affect his own title (m) (2). Thus if a bill is filed for discovery
- (k) Bancroft v. Wentworth, 3 Bro.
 C. C. 11. See, however, Bullock
 v. Richardson, 11 Ves. Jun. 373;
 Billing v. Flight, 1 Madd. R. 230.
- (l) Bulstrode v. Lechmore, 1 Ca. in Cha. 277; S. C. 2 Freem. 5; and see Legard v. Foot, Finch R. 82; Sandford v. Remington, 2 Ves. Jun.
- 189; Wright v. Mayer, 6 Ves. 280; Richards v. Jackson, 18 Ves. 472; 1 Sch. & Lefr. 226; Lowten v. Parkhurst, 2 Swanst. 194; and Harvey v. Clayton, and other cases reported, 2 Swanst. 221, note.
- (m) 2 Ves. Jun. 458; and see above, 319, et seq.; 3 Atk. 302.

⁽¹⁾ As to this subject, see the present editor's note to original page [307], infra.

Mr. Greenleaf, in his valuable work on evidence, has clearly expounded this rule, and presented the cases in which the attorney may be examined, and which are therefore sometimes mentioned as exceptions to the rule. See 1 Greenleaf on Ev., sec. 244, 245, and the following cases there cited.

Grenoigh v. Gaskell, 1 My. & K. 104; Desborough v. Rawlins, 3 My. & Craig, 521, 522; Lord Watsingham v. Goodrick, 3 Hare's Ch. R. 122; Story's Eq. Pl. sec. 601, 602; Boulton v. Corporation of Liverpool, 1 My. & K. 88; Annesley v. E. of Anglesea, 17 Howell's St. Trials, 1239, 1244; Gillard v. Butes, 6 M. & W. 547; Rex v. Brewer, 6 C. & P. 363.

^{. (2)} In Rowe v. Teed, 15 Ves. 378, Lord Eldon apparently considers a purchaser for value without notice in the same privileged situation as a party to whom questions are addressed, the answers to which would criminate him. He classes the two together as parties not subject to the ordinary rules, which oblige a defendant, who answers a bill, to answer "throughout."

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of goods purchased of a bankrupt, the defendant may plead that he purchased them boná fide for a valuable consideration, paid before the commission of bankrupt was sued out, and before he had any notice of the bankruptcy (n).

Pleas have been hitherto considered with reference only to original bills, and of these a certiorari bill, from the nature of the proceedings upon it, will or will not in general admit of a plea (o). But the same original tills grounds of plea will hold in many cases to the several other kinds of bills according to their respective natures; and some of them, as already observed, admit of a peculiar defence which may be urged by way of plea.

Thus if a bill of revivor is brought without suf- Pleas to bills of ficient cause to revive the suit against the defendant, and this is not apparent on the bill, the defendant may plead the matter necessary to show that the plaintiff is not entitled to revive the suit against him (p) (1). Or if the plaintiff is not entitled to

- (n) Perrat v. Ballard, 2 Ca. in 348; S. C. 2 Eq. Ca. Ab. 2; Hug-Cha. 72; Heyman v. Gomeldon, gins v. York Building Comp. 2 Eq. Finch R. 34; Abery v. Williams, 1 Ca. Ab. 3. A person made a defen-Vern. 27.
- (0) See, however, Cook v. Delebere, 3 Ch. Rep. 66, where a plea to a certiorari bill, of a decree in the inferior court, is mentioned.
 - (p) Harris v. Pollard, 3 P. Wms.

dant by a bill of revivor, cannot support, as a defence, a plea previously set up by the original defendant, and overruled. Samuda v. Furtado, 3 Bro, C. C. 70.

(1) [See the form of a plea to a bill of revivor, Willis, 583.]

When complainant in a suit assigns all interest therein to a third person and then dies, his grantee cannot revive and continue the proceedings by a simple bill of revivor. It can only be done, in such case, by an original bill in the nature of a bill of revivor and supplement. And where a defendant in such original suit is entitled to revive the proceedings therein, he must do it by a similar bill. To entitle a defendant to file a bill of revivor where the adverse party neglects to revive, such defendant

revive the suit at all, though a title is stated in the bill, so that the defendant cannot demur, the objection to the plaintiff's title may also be taken by way of plea. Indeed it seems to have been thought that a defendant could only object to revivor by way of plea or demurrer (q), and there may be great convenience in thus making the objection. For if the defendant objects by answer merely, the point can only be determined by bringing the cause regularly to a hearing (1); but if the objection is taken by plea or demurrer, it may in general be immediately determined in a summary way. However, if a defendant objects by answer only (2), or does not object at all, yet if it appears to the court that the plaintiff has no title to revive the suit against the defendant, he can take no benefit from it (r)(3). If a person entitled to revive a suit does not

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(q) Harris v. Pollard, 3 P. Wms. (r) Harris v. Pollard, 3 P. Wms.

must show that he has an interest in the revival of the suit. A defendant may revive in all cases after decree, upon neglect of the adverse party to do so, where he can be benefited by further proceedings in the suit. Anderson v. White, 10 Paige's Ch. R. 575.

(1) A defendant in a bill of revivor, cannot by answer prevent a revival of the suit, although he denies the right to revive. But although the defendant cannot by answer prevent an order for the revival of the suit, yet if the facts upon which the title to revive rests, are denied by the answer, the complainant must establish the right to revive at the hearing, or he will eventually fail in the suit. Day v. Potter, 9 Paige's Ch. R. 645.

prevented.

- (2) To prevent a suit from being revived, either a plea or a de-Revivor, how murrer must be put in to the bill of revivor. An answer insisting that the plaintiff has no right to revive is not sufficient: on the contrary, the putting in of an answer is submitting to the revivor. Lewis v. Bridgman, 2 Sim. 465. See form of a plea to supplemental bill, Willis, 585.
 - (3) Where a complainant files a supplemental bill for the purpose of bringing forward new matters which might have been introduced into

proceed in due time he may be barred by the statute for limitation of actions, which may be pleaded to a bill of revivor afterwards filed (s). If a sup-Pleas to supplemental bills. plemental bill is brought upon matter which arose before the original bill was filed, and this is not apparent on the bill, the defendant may plead that fact (t). And if a bill is amended by stating a matter arisen subsequent to the filing of the bill, and which consequently ought to have been the subject of a supplemental bill, advantage may be taken of the irregularity by way of plea, if it does not sufficiently appear on the bill to found a demurrer (u); but if the defendant answers, he waives the objection to the irregularity, and cannot make it at the hearing (x) (4).

A cross-bill differing in nothing from the first species of bills, with respect to which pleas in gen-

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(s) Hollingshead's case, 1 P. Wms. 742; and see 2 Sch. & Lefr. 632, et seq., and the cases cited; and Earl of Egremont v. Hamilton, 1 Ball &

(t) See Lewellen v. Macworth, 2

Atk. 40; Baldwin v. Mackown, 3 Atk. 817.

(u) See Brown v. Higden, 1 Atk. 291; Jones v. Jones, 3 Atk. 217.

(x) Belchier v. Pearson, at the Rolls, 13th July, 1782.

the original bill by way of amendment, the defendant si ould make his objection thereto by demurrer, or by plea, or in his answer to the supplemental bill. And it is too late to make such objection, for the first time, at the hearing. Fulton Bank v. N. Y. of Sharon Canal Co., 4

Paige's C. R. 127. (1) A plea that a plaintiff in a supplemental bill, as well as in an plea of no inte-original bill, has disposed of his share and interest in a company on rest in the plain-tiff in a supplebehalf of the members of which the original and supplemental bills mental bill were filed, and that at the time of filing the bill, he had no interest whatever in any of the proceedings, is not a good plea to such supplemental bill, where the relief sought by it is only a modification or alteration of the relief in the original suit, and where the original and supplemental bills ought therefore to be considered as one bill. Small v. Attwood, 1 Y. & C. Ex. 39.

eral have been considered, except that it is always occasioned by a former bill, it is not liable to any plea which will not hold to the first species of bills. And a cross-bill in general is not liable to some pleas which will hold to the first species of bills; as pleas to the jurisdiction of the court, and pleas to the person of the plaintiff, the sufficiency of which seem both affirmed by the original bill; unless the cross-bill is exhibited in the name of some person alone, who is alone incapable of instituting a suit, as an infant, a feme covert, an idiot, or a lunatic (u).

review.

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Pleas to bills of It has been already mentioned (x) that a part of the constant defence to a bill of review, for error apparent on a decree, has been said to be by a plea of the decree (y); but that a demurrer seemed to be the proper defence, and that the books of practice gave the form of a demurrer only to such a bill (z) (1). Where any matter beyond the decree, as length of time (a), a purchase for a valuable consideration, or any other matter, is to be offered against opening of the enrolment, that mat-

⁽u) See above, p. 240, note (s).

⁽x) Page 241.

⁽y) Dancer v. Evett, 1 Vern. 392; Carlish v. Gover, Nels. Rep. 52.

⁽z) And see Needler v. Kendall, Finch R. 468.

⁽a) Gregor v. Molesworth, 2 Ves. 109; but see above, p. 242.

⁽¹⁾ It is not necessary to plead the former decree, if such decree is fully and fairly stated in the bill of review. Webb v. Pell, 3 Paige's C. R. 368. The error must appear on the decree and pleadings; for the evidence in the case at large cannot be examined to ascertain whether the court misstated or misunderstood the fact. Dexter v. Arnold, 5 Mason's C. C. R. 309.

ter must be pleaded (b). And if a demurrer to a bill of review has been allowed, and the order allowing it is enrolled, it is an effectual bar to a new bill of review (c) on the same grounds, and may be pleaded accordingly. To a bill of review of a decree for payment of money, it has been objected by plea that according to the rule of the court (d) the money decreed ought to have been first paid; but the rule appears to have been dispensed with on security given (e); and as the bill of review would not stay process for compelling payment of the money, it may be doubted whether the objection was properly so made. A bill of review, upon

(b) Hartwell v. Townsend, 2 Bro. Amb. 229 (2). P. C. 107, Toml. Ed. (1), and see Gorman v. M. Cullock, 5 Bro. P. C. 597, Toml. Ed. As instances in which the error alleged was not in the body of the decree, see Cranborne v. Dalmahoy, 1 Ch. Rep. 231; Smith v. Turner, 1 Vern. 273; and see 2 Ves. 488; and Bradish v. Gee, 172; S. C. 1 Ca. in Cha. 42.

- (c) Denny v. Filmer, 2 Ca. in Cha. 133; S. C. 1 Vern. 135; 1 Vern. 417; Pitt v. Earl of Arglass, 1 Vern. 441; Woots v. Tucker, 2 Vern.
 - (d) Ord. in Ch. Ed. Bea. 3.
- (e) Savile v. Darcy, 2 Freem.

⁽¹⁾ Mr. Beames, in his Pleas in Equity, page 313, Am. ed. says, "The case of Hartwell v. Townsend, 2 Bro. P. C. 107, contains an important distinction with respect to this subject, that though the plaintiff in a bill of review, is confined to errors upon the face of the record, and cannot go out of it, yet the defendant is at liberty to allege every matter relevant to his defence, whether in or out of the record, by way of a plea, as a release, &c., to prevent disturbing the decree, nor has he any other method of introducing it, and when pleaded the court is to judge, whether the matter alleged is sufficient to preclude the plaintiff from the review he seeks. That case also decides, that whilst neither an assignee nor devisee can have relief by a bill of review, all the parties to the original bill must be made parties to the bill of review, on that principle of justice, that a party is not to be condemned without being heard."

^{(2) [}And see cases collected in Blunt's edition of Ambler, same page, note (1). 3 Paige, 368. Story's Equity Pleading, 2d edition, ¿ 833, page 639.]

the discovery of new matter, seems liable to any plea which would have avoided the effect of that matter if charged in the original bill. It seems to have been doubted whether the fact of the discovery of the matter thus alleged to support a bill of review, can be traversed by plea after the court upon evidence of the fact has given leave to bring the bill, even if the defendant could traverse the fact by positive assertion of some fact which would demonstrate that the matter was within the knowledge of the party, so that he might have had the benefit of it in the original suit. But if the fact of the discovery is in issue in the cause, it ought to be proved to entitle the plaintiff to demand the judgment of the court on the matter alleged, as ground for reviewing the decree (f); and it may consequently be disproved by evidence on the part of the defendant. Pleas to supplemental bills in the nature of a bill of mental bills in the nature of a bill of the nature of bills of review. review of a decree not signed and enrolled, upon the alleged discovery of new matter, it has been said, that if the defendant can show that the al-

> legation is false, he must do so by plea, and that it is too late to insist upon it by answer (g); but as the bill must allege the fact of discovery, and that fact must be the ground of the proceeding, it should

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(f) See p. 107.

principally on the ground, that length of time, with collateral circumstances, ought to operate as a bar to the plaintiff's title under the old settlement, which was dated in 1655; the defendants claiming under a subsequent settlement made in 1694, which had been constantly acted upon by the family. MS. N., S. C. 2 Eq. Ca. Ab. 579.

⁽g) 2 Atk. 40. The accuracy of this report seems very questionable. The supplemental bill was brought on discovery of an old settlement, found after a decree made in 1733. The cause came on upon the supplemental bill, and a rehearing of the decree complained of, 7 July, 1740. The decree was affirmed, and the supplemental bill dismissed without costs,

seem that it is equally liable to traverse by answer, and by evidence, as any other fact stated in a bill. If a decree is sought to be impeached on the ground Pleas to bills to impeach decrees of fraud, the proper defence seems to be a plea of for fraud. the decree accompanied by a denial of the fraud charged (h).

If a plaintiff filing a bill to carry a decree into Pleas to bills to execution has no right to the benefit of the decree, into execution. the defendant may plead the fact, if it is not so apparent on the bill as to admit of a demurrer. Bills in the nature of bills of revivor, or of supplemental bills, are liable to the same pleas as the bills of [294] whose nature they partake.

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Having thus considered some of the principal grounds upon which pleas to the several kinds of bills may be supported, it will be proper to observe some particulars with respect to, 1, the nature of pleas in general; 2, their form; 3, the manner in which they are offered to the court; and 4, the manner in which their validity is decided.

1. In pleading there must in general be the same and requisites of strictness in equity as at law (i); at least in matter pleas. of substance (2). A plea in bar must follow the bill,

(h) Wichalse v. Short, 3 Bro. P. see p. 281, et seq. C. 558, Toml. Ed.; S. C. 7 Vin. Ab. (i) 1 Vern. 114; 2 Atk. 632; 13 398, pl. 15; 2 Eq. Ca. Ab. 177; Ves. 233 (1). Loyd v. Mansell, 2 P. Wms. 73; and

^{(1) [}Burditt v. Grew, 8 Pickering's R. 108; Beames' Pleas, preface; Willis on Pleading, 486; 1 Montague on Pleading, 26.1 See Marselis v. The Morris Canal & B. Co., Saxton's C. R. (N. J.) 31.

⁽²⁾ Where an information against a company, after stating several Plea bad in form charities in which that company alone are interested, contains an alle- and substance. gation as to another charity in which that and another company are jointly interested; and that al'egation is afterwards struck out by amendment, in order to save making such other company parties; and

and not evade it, or mistake the subject of it (k). If a plea does not go to the whole bill, it must ex-

(k) Asgill v. Dawson, Bunb. 70; Child v. Gibson, 2 Atk. 603.

in place of such allegation another is substituted, that there are other funds vested in the former company upon "the like or corresponding trusts;" in such case, a plea of the will of the person who created the charitable trust struck out of the information, and that the other company above mentioned are not parties, is bad in point of form; because it is in fact an answer as to that of which it means to protect the defendant from making discovery; and it is also bad in substance, because comparing the amended information with the original, "the like or corresponding trusts" mean trusts for the exclusive benefit of the company interested in the other trusts. Attorney Gen. v. Merchant Taylors' Company, 5 Sim. 323.

Negative plea, denying that which is excepted out of the bill by the plea. If, to all the relief and discovery of a bill, except so much as seeks a discovery of an alleged promise which constitutes the whole equity, a defendant pleads, in bar, that no such promise was made, and, by an answer acompanying the plea, again denies the promise, the plea is bad; because the plea is to the bill, taking away that which alone constitutes the equity; so that if issue were taken on it there would be in the issue no affirmative, but only a negative of that which nobody affirms. Denys v. Shuckburgh, 6 Law J. (N. S.) 330, L. C.

Plea coupled with an inconsistent averment. If a plea is coupled with an averment which raises an issue not raised by the bill, and which, instead of supporting the plea, is in fact inconsistent with the plea, the plea will be overruled. *Emmott* v. *Mitchell*, 9 Jur. 171, V. C. E.

Plea to the relief only which ends with declining a discovery.

If a plea purports to be a plea to the relief only, but yet concludes with a demand of the judgment of the court whether the defendant ought to be compelled to make any other answer, such a plea is informal: for if the plea is to the relief only, the defendant professes that that he will give the discovery. King v. Heming, 9 Sim. 59.

Plea of the law of a foreign state. A plea that by the laws of a foreign country an agreement is void, is sufficiently definite, without specifying the particular law which renders the agreement void. Heriz v. Riera, 11 Sim. 318.

Plea to a bill of discovery in aid of an action.

If a bill of discovery is filed in aid of an action, and the right of action is founded upon a variety of circumstances put together, a plea which attempts to show that the action cannot be maintained by confessing and avoiding some of the circumstances and denying the rest, is not good; because it reduces the plaintiff to the necessity of proving, in a court of equity, without a discovery, that he has a right to support that action. Robertson v. Lubbock, 4 Simons C. R. 161.

press to what part of the bill the defendant pleads, and therefore a plea to such parts of the bill as are not answered must be overruled as too general (l) (1). So if the parts of the bill to which the plea extends are not clearly and precisely expressed; as if the plea is general, with an exception of matters after mentioned, and is accompanied by an answer, the plea is bad. For the court cannot judge what the plea covers, without looking into the answer, and determining whether it is sufficient or not, before the validity of the plea can be considered (m) (2).

It is generally conceived that a plea ought not to contain more defences than one; and though a plea may be bad in part and not in the whole (n), and may accordingly be allowed in part and overruled in part (3) yet there does not appear any case in

(1) Anon. 3 Atk. 70; Broom v. (n) 1 Atk. 53, 451, 539; 2 Atk. 44, 284; 1 Ves. 205; Welby v. Duke Horsley, Mosely, 40. (m) Salkeld v. Science, 2 Ves. of Portland, 2 Bro. P. C. 39, Toml.

107; Howe v. Duppa, 1 Ves. & B. Ed.; 1 Jac. R. 466.

242; Lord Drogheda v. Malone, Finlay's Digest, 449.]

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⁽¹⁾ When a plea does not go to the whole bill, it must distinctly set out the part of the discovery or relief intended to be covered by it, either in the words of the bill or by such a description that the court will not be obliged to look into the whole bill to ascertain the part thereof which is covered by the plea. But where a plea is overruled upon this ground, the defect being merely formal, it will be overruled without prejudice to the defendant's right to insist upon the same matters in his answer, as a defence to the suit pro tanto. Jarvis v. Palmer, 11 Paige's Ch. R. 650.

^{(2) [}And see case of Leaycraft v. Dempsey, in note at p. 300, post.] (3) [French v. Shotwell, 5 J. C. R. 555; S. C. on appeal, 20 J. R.

Such is the determined discretionary control of the court over the technicalities of pleading, that a sacrifice of the merits of the case to form is not permitted. While the defendant will have the benefit of his defence, the proceedings by amendment or otherwise, will be so shaped as to secure to the complainant also a full hearing on the whole

which two defences offered by a plea have been separated, and one allowed as a bar. Thus if a defendant pleads a fine and non-claim, which is a legal bar, and a purchase for a valuable consideration without notice of the plaintiff's claim, which is an equitable bar; if either should appear not to be a bar, if the defendant by answer should admit facts amounting to notice; or if the plea in respect to either part should be informal; there seems to

of his case. Hence, as observed in the text, though the general rule is that but one defence and facts only conducive to a single point, are allowed in a plea; yet double pleas are allowable, and a plea may be allowed in part, its benefit left to the hearing, or ordered to stand for an answer, or otherwise as may best subserve the purposes of justice. The Supreme Court of the United States, have adopted this rule for its Equity Courts, the English Chancery practice, recently took an enlarged view of the above principle in The State of Rhode Island v. State of Massachusetts, 14 Peters, 210, and held that in ordinary cases between individuals, Chancery has always exercised an equitable discretion in relation to the rules of pleading, when necessary to do so for the purposes of justice. But where two states were contesting a boundary the court would mould the rules of Chancery practice and pleading on the most liberal principles, so as both parties might present their respective claims in their full strength, and the case be brought to a final hearing on its merits.

A defendant in a suit in Chancery cannot put in several distinct defences, by plea, to the whole of the complainant's bill, or the same part of the bill without the special leave of the court. Nor can he set up two distinct defences in the same plea without rendering such plea bad for duplicity. Where great inconvenience will result to the defendant in a suit in Chancery by compelling him to answer the complainant's bill, the court upon special application may give him permission to plead two separate pleas in bar. The cases in which the court allows the defendant to make several defences by pleas to the complainant's bill, are those in which the making the defences by answer would render it necessary for the defendant to set out very long accounts, or where the discovery sought by the bill would be productive of injury to the defendant in his business or otherwise. Didier v. Davison, 10 Paige, 515. A defendant in a suit in Chancery may in his answer set up as many defences as he thinks proper, although he cannot do so by plea. But in a sworn answer he cannot set up two distinct matters, which are so inconsistent with each other, that it is impossible that both of them can be true. Hopper v. Hopper, 11 Paige's Ch. Rep. 46.

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be no case in which the court has separated the two matters pleaded, and allowed one as a bar and disallowed the other. And as the end of a plea is to reduce the cause, or the part of it covered by a plea, to a single point (o), in order to save expense to the parties, or to protect the defendant from a discovery which he ought not to be compelled to make; and the court to that end instantly decides on the validity of the defence, taking the plea, and the bill so far as it is not contradicted by the plea, to be true; a double plea is generally considered as informal and improper (p).

15 Ves. 82; 1 Ves. & B. 153, note, But it has been determined, that where great inconvenience would re-(p) Whitbread v. Brockhurst, 1 sult from obedience to this rule, the Bro. C. C. 404; S. C. 2 Ves. & B. court on a previous special applica-153, note. Nobkissen v. Hastings, tion will give to the defendant leave 4 Bro. C. C. 252; S. C. 2 Ves. Jun. to plead double (1). Gibson v.

⁽a) 1 Atk. 54; 1 Bro. C. C. 417; B. 150; 3 Madd. 8; 4 Madd. 245. 156-7; 1 Madd. R. 194.

^{84;} Wood v. Strickland, 2 Ves. & Whitehead, 4 Madd. 241 (2).

⁽¹⁾ In Saltus and Saltus v. Tobias and Seaman, 7 Johns. C. R. 214, Mr. Chancellor Kent seems to admit that on special application a defendant might be allowed to plead double. The defendants there pleaded, the statute of limitations and a discharge of one of the defendants under an insolvent act; and they were ordered to elect by which plea they would abide. The Chancellor there says: "The reason why this court does not admit such pleas, containing different and distinct points, is, that you may put all the different circumstances together in your answer, which you cannot do at common law. There is therefore, not the same reason in equity, as at law, for pleading double. The use of a plea here is to save time, expense and vexation. If one point will put an end to the whole cause, it is important to the administration of justice, that it should be pleaded; but if you are to state many matters, the answer is the more commodious form to do it in. If the defendant might be permitted to bring two points, on which the cause depends, to issue, by his plea, he might bring three or twenty, and so on until all the matters in the bill are brought to issue by the plea." See also Verchild v. Paul, 1 Keen's Ch. R. 87, 90. Robertson v. Lubbock, 4 Simons' C. R. 161. Bogardus v. Trinity Church, 4 Paige's Ch. R. 178.

⁽²⁾ Leave will be given to put in a double plea where extraordinary

[296] For if two matters of defence may be thus offered,

Leave to plead

inconvenience might arise if a double plea were not allowed. Thus, in a suit as to an invention, where the defendant is required to set forth accounts of extraordinary length, at a great expense, and at the risk of making an inconvenient exposure of his affairs, leave will be given to plead, first, that where the invention is new, it is not useful; and secondly, that where it is useful, it is not new. Kay v. Marshall, 1 Keen, 190. In this case Lord Langdale allowed two pleas to be filed and states his reasons as follows:- "Upon the subject of double pleas there has been considerable argument at the bar. It has been said that a double plea is only allowed in cases where there is a sort of double or alternative claim in the bill. In the case cited for the purpose of supporting that proposition there is such an alternative claim, but there is nothing to show that this is the principle, still less the only principle upon which the court proceeds in allowing double pleas. It appears to me that the principle upon which the court proceeds, depends very much upon the extraordinary inconvenience that might arise, if the defendant were not allowed in many cases to plead double. How far and in what cases a defendant may if he answer protect himself against answering fully has been a subject much controverted and upon which judges have differed. A defendant denying the principal fact upon which the plaintiff rests his claim to discovery is entitled to protect himself by plea against answering, and if his plea be accompanied by an answer the answer must be so framed as to support but not to overrule the plea. Lord Thurlow's objection to bringing two points in issue by plea has been adverted to in the argument. Why, says Lord Thurlow, it may be asked, should not the defendant be permitted to bring two points on which the cause depends to issue by his plea? The answer is, because if two he may as well bring three points to issue, and so on till all the matters in the bill are brought into issue upon the plea. This objection is not applicable to the modern practice of allowing double pleas, because, though a defendant may file a single plea without an application to the court, he cannot put in a double plea without such an application, and the liberty if sought to be abused is easily restrained. The general rule that if the defendant answers he must answer fully, however established, is no doubt a rule that in many cases occasions great hardship to the defendant. The only deence is a demurrer or a plea. A demurrer is not a convenient mode of defence, by reason of the admission which it involves if the case made by the bill, and the rules as to pleas in this court are of such exceeding nicety and difficulty, that it is almost impossible for parties who have a right to plead, to take full advantage of their right. The only way of saving defendants from the hardship to which in many

the same reason will justify the making any number of defences in the same way, by which the ends intended by a plea would not be obtained; and the court would be compelled to give instant judgment

cases they would be subjected by making a full discovery, is by affording to them such facilities as can, by the rules of the court, be afforded with respect to pleas. I do not think a great indulgence is sought from the court, where by obtaining it the defendant will obtain only that which the court thinks right. With respect to this particular case, if it be a matter of indulgence, I think the defendants under all the circumstances are entitled to it. The defendants are required by the bill to set forth accounts of extraordinary length at a great expense, and at the risk (though this does not appear) of making an inconvenient exposure of their affairs. This application therefore, must be granted, but according to the course of the court upon the condition of the defendant's paying the costs."

And when it will be no disadvantage to the plaintiff, and a great convenience to the defendant that the defences should be put in the form of pleas, in order that their validity may be considered before a discovery is enforced, leave will be given to plead to an ejectment bill; first, that a party is not heir; and, secondly, that even if he were heir, the plaintiff's right is barred by the statute of limitations. Bampton v. Birchell, 4 Beav. 558.

[The court may permit a defendant to plead double, under special circumstances; as where he could not make his defence by answer without setting out a long account, which would be unnecessary, if the defence sought to be made by plea was valid. Van Hook v. Whitlock, 3 Paige's C. R. 409. The case of Gibson v. Whitehead, supra, which is doubted by Mr. Willis, is upheld by Chancellor Walworth in the above case of Van Hook v. Whitlock; and see Lube, 348.]

A plea of the statute of limitations, setting up two matters, either of which establishes that defence, is not for that cause a double plea. 2 Sandford's Ch. R. 61.

The court will not allow the defendant to plead double, upon an affidavit merely, showing that he has several defences, of which he might avail himself by plea, if permitted to do so. The general rule of the Court of Chancery is, that if a defendant wishes to set up more than one defence to the complainant's bill, he must do it by answer; and to justify the court in departing from this general rule the defendant must make out a very special case of hardship and inconvenience to him if he should be required to make his several defences by answer. Didier v. Davison, 10 Paige, Ch. R. 515.

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on a variety of defences, with all their circumstances, as alleged by the plea, before they are made out in proof; and consequently would decide upon a complicated case which might not exist. This reasoning perhaps does not in its extent apply with equal force to the case of two several bars pleaded as several pleas, though to the same matter: and it may be said that such pleading is admitted at law, and ought therefore to be equally so in equity. But it should be considered that a plea is not the only mode of defence in equity, and that therefore there is not the same necessity as at law for admitting this kind of pleading. But though a defence offered by way of plea consist of a great variety of circumstances, yet if they all tend to one point the plea may be good (1) (0). Thus a

(o) Cann v. Cann, 1 P. Wms. 725; Ashurst v. Eyres, 3 Atk. 341; 15

Distinct pleas to distinct parts of a bill.

(1) See p. 285, n. A distinct plea may be put in to distinct parts of the relief sought by the same bill. *Emmott* v. *Mitchell*, 9 Jur. 171, V. C. E.

But each "plea in order to be good, must be an allegation or denial of some leading fact, or of some matters which, taken collectively, make out some general fact." Robertson v. Lubbock, 4 Sim. 179.

Multifarious or double pleas.

Hence, inasmuch as the fact of a party being heir is consistent with the fact of there being no descent; and as there may have been a descent without a seisin; a plea of not heir, no descent, and no seisin, is a plea of several matters and multifarious. Chadwick v. Broadwood, 3 Beav, 530.

A plea that a person had not intermeddled with a testator's estate, and that he had renounced probate, is not a double plea to a bill alleging that he had possessed certain of the testator's effects, and was the personal representative of the testator; for both the averments in the plea only amount to this, that the character of executor never was in him. Strickland v. Strickland, 12 Sim. 253.

A plea that the plaintiff had not obtained his certificate under a commission of bankruptcy, and that no dividend, or a dividend or dividends less than fifteen shillings in the pound had been paid, and

plea of title deduced from the person under whom

Ves. 82, 377; Leonard v. Leonard, of distinct propositions, and a single between a double plea, consisting circumstances. (2)

1 Ball, & B. 323 (1). And see 2 plea consisting of one connected Blackst. 1028, as to the distinction proposition formed from multifarious

that the assignee was a necessary party, is not a double plea, because the facts as to the certificate and dividend lead but to one point, namely, the necessity of the assignee being a party. Kirkman v. Andrews, 4 Beav. 554.

A plea of a stated account, and of a release, or receipt of the balance, is not a double plea. And such account, if not impeached by the bill, need not be annexed to the plea. Holland v. Sprowle, 6 Sim. 23.

So a plea of the statutes of limitation, 21 Jac. 1, and 9 Geo. IV., is not a double plea; for they ought to be considered as jointly making but one law. Forbes v. Skelton, 8 Sim. 335.

But a plea, which is in effect a plea of the statute of limitations, and of no liability ever incurred, is a double and inconsistent plea, and bad. Emmott v. Mitchell, 9 Jur. 171, V. C. E.

And a plea averring that a fine was levied of an estate claimed by the bill, and that such estate is the only part of the property claimed in which the defendant has any interest, will be overruled as a double plea. Watkins v. Stone, 2 Sim. 49.

- (1) Goodrich v. Pendleton, 3 J. C. R. 384.
- (2) [See the case of Wilkins v. Stone, 2 Sim. 49, where a disclaimer was added to a plea and the plea overruled. It was looked upon as a double plea.

It is the pleading of a double bar which constitutes duplicity in a plea. But a plea is not rendered double by the mere mention of averments therein which are necessary to exclude conclusions arising from allegations in the bill intended to anticipate and defeat the bar which might be set up by the plea. Chancellor Walworth, in Bogardus v. Rector, &c. of Trinity Church, (4 Paige's R. 178, 196.) His honor proves the propriety of inserting such averments, thus: "If the defendant was not bound, by averments in his plea, to negative the allegations in the bill inserted for the purpose of anticipating and displacing the bar, the complainant would frequently be compelled to rely upon the defendant's oath alone for the evidence of the truth of such allegations: and he would have no opportunity to contradict that oath, under the issue joined upon the plea. If that course of pleading were adopted, the whole plea might be true, although the answer in support of such plea were absolutely false and could be proved to be so, if an opportunity were offered to the complainant for that purpose." Ib.]

[297] the plaintiff claims may be a good plea though consisting of a great variety of circumstances (p); for the title is a single point, to which the cause is reduced by the plea (q). It therefore seems that a plea can be allowed in part only with respect to its extent, the quantity of the bill covered by it; and that if any part of the defence made by the plea is 347

bad, the whole must be overruled (r).

A plea must aver facts to which the plaintiff may reply (s), and not in the nature of a demurrer, rest on facts in the bill (t). The averments ought in general to be positive (u). In some cases, indeed, a defendant has been permitted to aver according to the best of his knowledge and belief; as that an account is just and true (x); and in all cases of negative averments (y), and of averments of facts not within the immediate knowledge of the defendant (z), it may seem improper to require

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⁽p) Martin and Martin, House of Lords, 6th March, 1724-5; and note, Mr. Cox's Ed.; Howe v. Duppa, 1 Ves. & B. 511; Gait v. Osbaldeston, 1 Russ. 158; S. C. 5 Madd. 428.

⁽q) See Doble v. Cridland, 2 Bro. C. C. 274.

⁽r) As instances of a plea not being a complete defence to the bill, or to so much thereof as it purports to cover, see Moore v. Hart, 1 Vern. 110; Salkeld v. Science, 2 Ves. 107; Potter v. Davy, 3 Vin. Ab. 135; Hoare v. Parker, above p. 322, note; Jones v. Davis, 16 Ves. 262; Chamberlain v. Agar, 2 Ves. & B. 259; Spottiswood v. Stockdale, Coop. R. 102; Barker v. Ray, 5 Madd. 64.

⁽a) 15 Ves. 377.

⁽t) Bicknell v. Gough, 3 Atk. 558; Else v. Doughty, 1 P. Wms. 387, .2 Ves. 296; Roberts v. Hartley, 1 Bro. C. C. 56; 6 Ves. 594; Billing v. Flight, 1 Madd. R. 230; Steff v. Andrews. 2 Madd. R. 6. The prominent distinction between a plea and a demurrer, (Ord. in Ch. 26 Ed. Bea.) here noticed, is strictly true, even of that description of plea which is termed negative, (above, p. 269,) for it is the affirmative of the proposition which is stated in the bill.

⁽u) 3 Atk. 590.

⁽x) 3 Atk. 70; Burgony v. Machell, Tothill, 70.

⁽y) See Drew v. Drew, 2 Ves. & B. 159.

⁽z) 2 Ves. & B. 162.

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a positive assertion (1). Unless, however, the averment is positive, the matter in issue appears to be, not the fact itself, but the defendant's belief of it: and the conscience of the defendant is saved by the nature of the oath administered; which is, that so much of the plea as relates to his own acts is true, and that so much as relates to the acts of others he believes to be true. All the facts necessary to render the plea a complete equitable bar to the case made by the bill, so far as the plea extends, that the plaintiff may take issue upon it (a), must be clearly and distinctly averred (2).

(a) Gilb. For. Rom. 58; 2 Ves. 296; and see Carleton v. Leighton, 3 Meriv. 667.

(1) According to the case of Kirkman v. Andrew, a plea that the Plea of informadefendant is informed and believes that the plaintiff became bankrupt, a fact. is a sufficient plea of bankruptcy; inasmuch as the facts stated in an answer upon the information and belief of the defendant are held to be sufficiently put in issue; and as the allegations in a plea, if they relate to the acts of others, however positively made in the plea itself, are sworn to only upon the belief of the defendant. 4 Beav. 554.

But according to the case of Small v. Attwood, a plea that the defendant has been informed and believes that the plaintiff has no interest in the suit is bad; because, in this case, the onus probandi being on the defendant, since he undertakes to show that the plaintiff has no interest, he must be as capable of stating his facts positively as of proving them; and if upon issue being taken upon the plea, he were to prove his information and belief, that would not be an answer to the bill. 1 Y. & C. Eq. Ex. 39.

(2) In a plea it is unnecessary to negative facts which would defeat Negativing facts the plea, if they are not stated in the bill. But if the plea does con- not stated in the bill. tain averments negativing such facts, such averments are merely superfluous; they do not vitiate the plea. Forbes v. Skelton, 8 Sim. 325.

"Where a bill alleges a fact, and alleges other circumstances calcu- Denial of allegalated and tending to prove that fact, the defendant cannot plead the tions tending to negative of the fact, without denying the statements and allegations in nied by the plea.

ments are likewise necessary to exclude intend-

the bill which have a tendency to prove it." Denys v. Shuckburg, 6 Law J. (N. S.) 330, L. C.

Answer as to documents in support of a negative plca.

If a defendant puts in a negative plea (such as a plea of no tithable things to a bill for tithes,) and there is a charge in the bill as to documents from which the plaintiff's right to relief would appear, the defendant must deny such charge by an answer in support of the plea. Clayton v. The Earl of Winchester, 3 Y. & C. Eq. Ex. 426, 683. · See also note to p. 270.

If a defendant puts in a plea denying a partnership in a business, and by his answer admits that he is in possession of documents relating to the said business, but, "save as aforesaid," denies that he has any documents whereby the truth of the alleged matters would appear, he admits that the truth of the contrary of the plea would appear by evidence in his possession, and this renders the plea bad, although in his answer he goes on to insist, that inasmuch as the documents in his possession relate exclusively to his own title, and do not in any way tend to support the plaintiff's claim, he is not bound to produce them. Harris v. Harris, 3 Hare, 450.

Plea of non-payment of purchase money.

A plea to a bill for discovery in aid of an ejectment, that the purchase money contracted to be paid for the estate has not been paid or released, is defective in not averring that the money is due, where, from the circumstances of the case, it is probable that it was not the intention of the parties that it should be paid: as where the conveyance was made by a father to his son, and although containing a recital of an agreement for a sale to the son, was yet expressed to be made in consideration of natural affection. Drake v. Drake, 3 Hare, 523.

Plea of an agreement to waive

If to a bill for an account of partnership transactions, by the executors of a deceased partner, the defendant pleads that for a certain consideration a parol agreement was entered into between the deceased partner and the defendant, that all accounts between them, and all claims of the former in respect of the effects of the partnership and the debts due to and from the same, should be waived; such agreement will be construed to be an agreement that the defendant should take upon himself the discharge of such partnership liabilities (if any) as remained to be satisfied; and the plea will be overruled, if it does not aver that no such liabilities still remained undischarged. Brown v. Perkins, 1 Hare, 564.

Plea not travers

Where a bill is filed to establish a will of real estate, of which it ing the material alleges several copies were executed, a plea that the will proved in the ecclesiastical court, did not contain certain passages is bad, because it does not negative the fact that the will was as stated in the

ments (1) which would otherwise be made against the pleader; and the averments must be sufficient to support the plea (b).

If there is any charge in the bill, which is an equitable circumstance in favor of the plaintiff's case against the matter pleaded; as fraud, or notice of title; that charge must be denied by way of answer, as well as by averment in the plea (c). In this case the answer must be full and clear, or it will not be effectual to support the plea (d); for the court will intend the matters so charged against the pleader, unless they are fully and clearly denied (e). But if they are in substance fully and clearly

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- (b) 2 Ves. 245: 2 Sch. & Lefr. 727; 18 Ves. 182.
- (c) See the judgment in Bayley v. Adams, 6 Ves. 594; 2 Sch. & Lefr. 727; 2 Ves. & B. 364; 5 Madd. 330; 185. As an example, see Hony v. 6 Madd. 64; 2 Sim. & Stu. 279; and see above, p. 281, et seq., and p. 299.
- (d) 3 Atk. 304; Radford v. Wilson, 3 Atk. 815; 3 P. Wms. 145; 5 Bro. P. C. 561, Toml. Ed.
 - (e) 2 Atk. 241; Gilb. Ca. in Eq. Hony, 1 Sim. & Stu. 568.

bill, but traverses the fact of the copy proved in the ecclesiastical court being to the effect stated in the bill, which is quite immaterial in regard to a question of real estate, as the ecclesiastical court has no jurisdiction in cases of real estate. Strickland v. Strickland, 3 Beav. 224.

Where a defendant, in his answer to a bill for tithes of a mill, says Pleading exempthat it is an ancient mill, built before living memory; that no tithes tion from tithes. have ever been paid for it; and that it has been always considered exempt from tithes; the exemption is well pleaded. Townley v. Colegate, 2 Sim. 297.

" A negative plea, as to belief, of no mortgage, not going to material Negative plea as collateral charges tending to that point, is too loose and general." to belief. Arnold v. Heafield, 1 M'Cleland & You. 330.

(1) [The meaning of an intendment is, that allowing an averment to be true, but that at the same time a case may be supposed consistent with it, which would render the averment inoperative as a full defence, such case shall be presumed, unless specifically excluded by particular averment; as where a proposition in the disjunctive is not denied in both its par's, or a proposition in the conjunctive affirmed in both its parts. Lube, 343.]

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denied, it may be sufficient to support the plea, although all the circumstances charged in the bill may not be precisely answered (f) (1). Though the court upon argument of the plea, may hold these charges sufficiently denied by the answer to exclude intendments against the pleader, yet if the plaintiff thinks the answer to any of them is evasive, he may except to the sufficiency of the answer in those points. A defendant may also support his plea by an answer touching any thing not charged by the bill, as notice of a title, or fraud; for by such an answer nothing is put in issue covered by the plea from being put in issue (g), and the answer can only be used to support or disprove the plea (h). But if a plea is coupled with an answer to any part of the bill covered by the plea, and which consequently the defendant by the plea declines to answer, the plea will upon argument be overruled (i) (2).

Where facts appeared upon an answer to an original bill, which would operate to avoid the de-

⁽f) 5 Bro. P. C. 561, Toml. Ed.

⁽i) Cottington v. Fletcher, 2 Atk.

⁽g) Gilb. For. Rom. 58, 59.

^{. 155;} Gilb. For. Rom. 58.

⁽h) See 3 Atk. 303.

^{(1) [}The only way of testing the sufficiency of an answer in support of a plea is, to consider every allegation in the bill which is not sufficiently denied by the answer as true; and then to inquire, whether, these facts being admitted, the plea is a sufficient bar to the claim of the complainant for relief. Chancellor Walworth, in Bogardus v. Rector, &c. of Trinity Church, (4 Paige's R. 178.)]

^{(2) [}Souzer v. De Meyer, 2 Paige's C. R. 574; Bogardus v. Rector, &c. of Trinity Church, 4 Id. 178.] Watkins v. Stone, 2 S. & S. 560. By the 37th order of Aug. 1841, "no plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea."

fence made by plea to an amended bill, the answer to the original bill was read on the argument of the plea, to counterplead the plea (k); so it should seem if the answer to an original bill would disprove an averment in a plea to an amended bill, the court might permit it to be read for that purpose (l).

2. A plea, like a demurrer, is introduced by a protestation against the confession of the truth of 2. Form of pleas any matter contained in the bill. For the purpose of determining the validity of the plea, the bill, so far as it is not contradicted by the plea (m), is taken for true; and the protestation has probably been used to prevent the same conclusion for other purposes. The extent of the plea, that is, whether it is intended to cover the whole bill, or a part of it only, and what part in particular, is usually stated in the next place: and this, as before observed (n), must be clearly and distinctly shown (1).

⁽k) Hyliard v. White, in Cha. 15th March, 1745.

⁽m) See Plunket v. Penson, 2 Atk. 51; 15 Ves. 377.

⁽¹⁾ See the case of Hildyard v. Cressy, 3 Atk: 303.

⁽n) Page 343.

^{(1) [}In the case of Leaycraft v. Dempsey, 4 Paige's Ch. R. 124, 125, Chancellor Walworth has properly shown how he will notice a want of form in pleading. The error had not been found out by the opposing counsel. An answer and plea were put in. The plea went upon a stated account up to a certain time, and the answer took up the matter from such period. The answer preceded the plea; and the pleading commenced by a statement of its being, "The answer and plea of J. D., defendant, to the bill of complaint, &c." It then went on with the usual saving and reservation of errors; and "for answer thereto, or to so much thereof as this defendant is advised, it is material or necessary for her to make answer unto, answering, savs, &c." And ended, with a denial of combination, and the general traverse. The answer was limited as to discovery to the extent intended. And in

The matter relied upon as an objection to the ju-

coming to the plea, the usual commencement occurred. "And as to so much and such parts of the said bill as seeks an account of the said one equal third part of a net moiety of the rents and profits of the said leasehold premises prior to the first day of February, one thousand eight hundred and thirty-one, and including the quarters' rents due that day, this defendant for plea thereto, saith, &c." The following is the chancellor's opinion: "The plea in this case is a sufficient defence to so much of the bill as seeks an account and satisfaction of the rents and profits of the premises in the bill mentioned up to and including the 1st of February, 1831. But it is defective in a point of form, as being overruled by the answer. It is not necessary to decide the question, whether any of the facts stated in the answer do, in fact, cover the part of the bill intended to be covered by the plea. I am inclined to think, however, they do not. But, by referring to the commencement of the answer, it will be seen, that it purports to be an answer to the whole of the bill, without excepting those parts to which the defendant has pleaded in bar both to the discovery and relief. The defendant may plead, answer and demur to the same bill; but each of these defences must refer to and profess, in terms, to be put in as a defence to separate and distinct parts of the bill. Thus, if an answer commence as an answer to the whole bill, it will overrule a plea or demurrer to any particular part of the bill, although the defendant does not, in fact,' answer that part of the bill which is covered by the plea or demurrer. Lord Redesdale says, if the plea is to part of the bill only, and there is an answer to the rest, it is expressed to be an answer to so much of the bill as is not before pleaded to, and is preceded by a protestation against the waiver of the plea. (Mitf. Pl. 4 Lond. ed. 300.) In practice, the plea or demurrer usually precedes the answer, which in that case commences thus: 'And as to the residue of the said bill, this defendant, not waving his said plea but relying thereon, and saving and reserving to himself, &c., for answer thereto, or to so much thereof as he is advised is material, &c.' Lube's Eq. Pl. 352. I see no objection, except as to the convenience of reference, in permitting the answer to precede the plea, as has been done in the present case, but then the pleader must, by a reference to the part of the bill, which is subsequently covered by the plea, or otherwise show that it is an answer, to the residue of the bill only. As the answer in this case commences and concludes as an answer to the whole bill, in the same manner as if it was not intended to be followed by a plea as to part, in point of form the plea is overruled by the answer, and cannot, therefore, be allowed.

As this plea, however, is a full defence to so much of the bill as it

risdiction of the court, to the person of the plaintiff or defendant, or in bar of the suit, generally follows, accompanied by such averments as are necessary to support it. The plea commonly concludes with a repetition that the matters so offered are relied upon as an objection or bar to the suit, or so much of it as the plea extends to; and prays the judgment of the court, whether the defendant ought to be compelled further to answer the bill, or such part as is thus pleaded to. If the plea is accompanied by an answer merely to support it, the answer is stated to be made for that purpose, not waiving the plea. If the plea is to part of a bill only, and there is an answer to the rest, it is expressed to be an answer to so much of the bill as is not before pleaded to, and is preceded by the same protestation against waiver of the plea.

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3. A plea (o) is filed like a demurrer in the pro- 3. How pleas are

(o) A plea must be signed by counbelow, p. 376, as to the taking of an sel, unless taken by commissioners. answer. Simes v. Smith, 4 Madd, 366.

professes to cover and is merely informal, in consequence of the inadvertence of the solicitor in not excepting that part of the bill in the commencement of his answer, it would be a matter almost of course to permit him to amend on payment of costs. As the cause must go to a hearing upon the other part of the bill, it will be equally beneficial to the defendant if I permit the plea to stand for an answer. I shall, therefore, direct it to stand for an answer, declaring it as a good defence if established by proof, to so much of the bill as seeks for an account and satisfaction of the rents and profits up to and including the 1st February, 1831; and that the complainant is not, by exceptions, to be permitted to call for an account for those rents and profits, or any further answer as to that part of the bill. This, however, will not preclude the complainant from excepting to the answer to the other parts of the bill, if it is insufficient. (Coke v. Wilcox, Mos. Rep. 74.) And the defendant must pay the costs of the argument of the plea."

per office; and pleas in bar of matters in pais (o), must be upon oath of the defendant; but pleas to the jurisdiction of the court, or in disability of the person of the plaintiff (p), or pleas in bar of any matter of record, or of matters recorded, or as of record in the court itself (q), or any other court (r), need not be upon oath (1).

4. Proceedings on them.

4. If the plaintiff conceives a plea to be defective in point of form or substance, he may take the judgment of the court upon its sufficiency. And if the defendant is anxious to have the point determined, he may also take the same proceeding (2). Upon argument of a plea it may either be allowed simply, or the benefit of it may be saved to the hearing, or it may be ordered to stand for an answer. In the first case the plea is determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the averments necessary to support it, be true. If, therefore, a plea is al-

(o) Prac. Reg. 325, Wy. Ed.

(p) Ord. Ch. 27, 172, Ed. Bea.

(q) Prac. Reg. 324, Wy. Ed.

corded be accompanied with averments of matters in pais, it must be upon oath. Wall v. Stubbs, 2 Ves.

(r) But if a plea of matters re- & Bea. 354; see above, pp. 265-268.

^{(1) [}Carroll v. Waring, 3 Gill. & Johns. 491. Leave to withdraw a plea will not be given. Kirby v. Taylor, 6 J. C. R. 242. There can be no demurrer to a plea. If supposed insufficient, it may be set down for argument. Thomas's Trustees v. Brashea, 4 Monroe's R. 67.]

^{(2) [}See above. By the practice of the State of New York, the complainant has ten days to file a replication to the plea or to amend his bill; and if he does not take issue on the plea or amend his bill within that time, either party may notice the plea for argument at the next or any subsequent term. If the plea is allowed, the complainant may, within ten days after notice of such allowance, take issue on the plea upon payment of the hearing therein. 47th Rule. As to a defendant pleading matter of record, see 48th Rule.]

lowed upon argument, or the plaintiff without argument thinks it, though good in form and substance, not true in point of fact, he may take issue upon it, and proceed to disprove the facts upon which it is endeavoured to be supported (s). For if the plea is upon argument held to be good, or the plaintiff admits it to be so by replying to it (t), the truth of the plea is the only subject of question remaining, so far as the plea extends; and nothing but the matters contained in the plea, as to so much of the bill as the plea covers, is in issue between the parties (u). If therefore issue is thus taken upon the plea, the defendant must prove the facts it suggests (x). If he fails in this proof, so that, at the hearing of the cause, the plea is held to be no bar, and the plea extends to discovery sought by the bill, the plaintiff is not to lose the benefit of that discovery, but the court will order the defendant to be examined on interrogatories, to supply the defect (y). But if the defendant proves the truth of

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⁽t) 1 Vern. 72, Prec. in Ch. 58 (2). Huddleston, Dick. 510.

⁽u) 3 P. Wms. 95; Parker v. Blythmore, Prec. in Chan. 58. See Cooper v. Tragonnel, 1 Ch. Rep. 174 (3).

⁽s) Prac. Reg. 330, Wy. Ed. (1). (x) Mos. 73; 2 Ves. 247; Ord v.

⁽y) Nels. Rep. 119; Astley v. Fountaine, Rep. Tem. Finch, 4; 2 Ves. 247; 6 Madd. 63; 2 Sim. & Stu. 278 (4).

^{(1) [}See 47th Rule of N. Y. Chancery. In Bogardus v. Rector, dc. of Trinity Church, 4 Paige's R. 178, Chancellor Walworth allowed a plea, and ordered the bill to be dismissed with costs: unless, within twenty days, the complainant should pay the costs of the argument of the plea and file a replication to the answer.

^{(2) [} Hughes v. Blake, 6 Wheat. 472; Dows v. M. Michael, 2 Paige's C. R. 345.]

^{(3) [}The issue, as to the truth of the plea, is to be referred to the state of the facts at the time of filing the plea. Cook v. Mancius, 4 J. C. R. 166.]

^{(4) [}Souzer v. De Meyer, 2 Paige's C. R. 574. A plea which sets

the matter pleaded, the suit, so far as the plea extends, is barred (z), even though the plea is not good either in point of form or substance. Therefore, where a defendant pleaded a purchase for a valuable consideration, and omitted to deny notice of the plaintiff's title, and the plaintiff replied, it was determined that the plea, though irregular, had been admitted by the replication to be good, and that the fact of notice not being in issue, the defendant, proving what he had pleaded, was entitled to have the bill dismissed (a).

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If upon argument the benefit of a plea is saved to the hearing, it is considered that so far as appears to the court it may be a defence; but that there may be matter disclosed in evidence which would avoid it supposing the matter pleaded to be strictly true; and the court therefore will not preclude the question (2).

When a plea is ordered to stand for an answer, it is merely determined that it contains matter which may be a defence, or part of a defence; but that it is not a full defence, or it has been informally offered by way of plea, or it has not been properly supported by answer, so that the truth of it is doubtful. For if a plea requires an answer to support it, upon argument of the plea the answer may be read .

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⁽z) See Wichalse v. Short, 3 Bro. (a) Harris v. Ingledew, 3 P. Wms. P. C. 558 (1). 94, 95.

up no valid defence to any part of the matter it professes to cover, should be overruled absolutely, and will not be permitted to stand for an answer. Orcutt v. Orms, 3 ib. 459.]

^{(1) [}Hughes v. Blake, supra; Dows v. M'Michael supra.]

^{(2) [}By the practice of the State of New York, there cannot be a plea after one has been overruled. 49th Rule; and see Rowley v. Eccles, 1 Sim. & S. 511.]

to counterprove the plea; and if the defendant appears not to have sufficiently supported his plea by his answer the plea must be overruled, or ordered to stand for an answer only (b). A plea is usually ordered to stand for an answer, where it states matter which may be a defence to the bill, though perhaps not proper for a plea, or informally pleaded (c). But if a plea states nothing which can be a defence it is merely overruled (3). If a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers (d), unless by the order liberty is given to except (e). But that liberty may be qualified, so as to protect the defendant from any particular discovery which he ought not to be compelled to make (f).

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- (b) See Hildyard v. Cressy, 3 Atk. 304 (1).
- (c) As examples, see Moore v. Hart, 1 Vern. 110; S. C. ibid. 201; Sim. & Stu. 529 (4). Kemp v. Kelsey, Prec. in Cha. 544; (f) See Alardes v. Campbell, Salkeld v. Science, 2 Ves. 107; C. C. 559; Wood v. Strickland, 2 Ves. & B. 150.
- (d) Coke v. Wilcocks, Mos. 73; 6 Ves. 586. 3 P. Wms. 240; 3 Atk. 815.

- (e) Sellon v. Lewen, 3 P. Wms. 239; Maitland v. Wilson, 3 Atk. 814. See Dryden v. Robinson, 2
- Bunb. 265; S. C. 1 Turn. R. 133, Whitbread v. Brockhurst, 1 Bro. C. note; Herbert v. Montagu, Finch. C. 404; (2) S. C. 2 Ves. & B. 153, R. 117; Brereton v. Gamul, 2 Atk. note; Whitchurch v. Bevis, 2 Bro. 240; Pusey v. Desbouvrie, 3 P. Wms. 315; King v. Holcombe, 4 Bro. C. C. 439; Bayley v. Adams,

^{(1) [}Also Kirby v. Taylor, 6 J. C. R. 242.]

^{(2) |} Orcutt v. Orms, 3 Paige's C. R. 459. And see Souzer v. De Meyer, 2 Paige's C. R. 574. Where a plea has been overruled on the merits, the same matter cannot be set up in the answer as a bar to the suit, without the special permission of the court. Townsend v. Townsend, 3 lb. 413.

^{(3) [}Orcult v. Orms, 3 Paige's C. R. 459.]

^{(4) [}Kirby v. Taylor, 6 J. C. R. 242; Orcutt v. Orms, supra. In this case (Orcult v. Orms.) Chancellor Walworth has said, that the answer will be considered as a full answer, though not necessarily a perfect defence.]

And if a plea is accompanied by an answer, and is ordered to stand for an answer, without liberty to except, the plaintiff may yet except to the answer, as insufficient to the parts of the bill not covered by the plea (f). If a plea accompanied by an answer is allowed, the answer may be read at the hearing of the cause to counterprove the plea (g)(1).

There are some pleas which are pleaded with such circumstances that their truth cannot be disputed; and others being pleas of matter of fact, the truth of which may be immediately ascertained by mere inquiry, it is usually referred to one of the masters of the court to make the inquiry. These pleas, therefore, are not usually argued (h). Thus pleas of outlawry or excommunication (3), being always pleaded sub sigillo, the truth of the fact pleaded is ascertained by the form of pleading, and the suit is consequently delayed until the disability shall be removed, unless the plaintiff can show that the plea is defective in form, or that it does not apply to the particular case, and for these purposes he may have the plea argued. Pleas of a former decree (i), or of another suit depending (k), are

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⁽f) Cock v. Wilcoeks, Mos. 73.

⁽g) 3 Atk. 304. But the plaintiff Sim. & Stu. 12. (2) may not amend his bill as of course after a plea to part of the bill has

been allowed. Taylor v. Shaw, 2

⁽h) Ord. in Ch. 175, Ed. Bea.

⁽i) Morgan v. Morgan, 1 Atk. 53.

⁽k) Ord. in Ch. 98, ed. 1739.

^{(1) [}After a plea has been overruled, the same defence may be insisted on by way of answer. Goodrich v. Pendleton, 4 J. C. R. 549. But this is not so, upon a plea of the statute of limitations. Carter v. Murray, 7 J. C. R. 167.]

^{(2) [}If a plea be overruled, the complainant may, within ten days thereafter, amend his bill of course and without costs. 45th Rule of N. Y. Chancery.

⁽³⁾ This disability is removed by the stat. 53 Geo. III. c. 127, § 3.

generally referred to a master to inquire into the fact; and if the master reports the fact true, the bill stands instantly dismissed, unless the court otherwise orders (1). But the plaintiff may except to the master's report and bring on the matter to be argued before the court (m); and if he conceives the plea to be defective, in point of form or otherwise, independent of the mere truth of the fact pleaded, he may set down the plea to be argued as in the case of pleas in general (n).

CHAPTER II.

SECTION II.—PART III.

Of Answers and Disclaimers; and of Demurrers, Pleas, Answers, and Disclaimers, or any two or more of them, jointly.

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If a plea is overruled, the defendant may insist on the same matter by way of answer (a). And whatever part of the bill is not covered by demur-

(1) See Crofts v. Wortley, 1 Ca. See Urlin v. ---, 1 Vern. 332; and in Ch. 241. See above, pp. 278, 288. Foster v. Vassall, 3 Atk. 587.

(m) Durrand v. Hutchinson, Mich. 1771, on Exceptions.

(a) 2 Ves. 492; Earl of Suffolk v. Green, 1 Atk. 450; 1 Cox, R. 228 (1).

(n) Ord. in Ch. 176, Ed. Bea.

If the defendant has a substantial defence which cannot avail him under his plea, from inaccuracy in pleading, he may claim the full benefit of such defence by his answer. 1 Green's Ch. R. 338.

^{(1) [}S. P. Goodrich v. Pendleton, 4 J. C. R. 549. But see Carter v. Murray, 7 ib. 167; and particularly the observations of Sutherland, J., in (S. C.) Murray v. Coster, 4 Cow. 620. It is said, in Townsend v. Townsend, 2 Paige's C. R. 413, that where a plea has been overruled on the merits, the same matter cannot be set up in the answer as a bar to the suit, without the special permission of the

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rer or plea, must be defended by answer (b), unless the defendant disclaims (1). In treating of answers and disclaimers will be considered—1. The general nature of answers; 2. Their form; 3. The manner in which their sufficiency is decided upon, and deficiency supplied; and 4. The nature and form of disclaimers.

Necessity of discovering what is material.

1. It has been already (c) mentioned, that every plaintiff is entitled to a discovery from the defendant of the matters charged in the bill (d) (2), provided they are necessary to ascertain facts material to the merits of his case, and to enable him to obtain a decree (3). The plaintiff may require this

- (b) Prac. Reg. Wy. Ed.
- (c) Page 9.
- (d) Where the defendants are numerous, each, it seems, is entitled to put in a separate answer, although

they should have but one common defence. Van Saudau v. Moore, 1

Russ. R. 441, on appeal, See S. C. 2 Sim. & Stu. 509. [But see 1 Headlam's Dan. C. P. 695.]

- (1) See note to p. 380.
- (2) See note to p. 52.

Answer of a sole defendant.

The 17th, 18th, and 19th orders of August 1841, do not apply to the case of a sole defendant. Lynch v. Lecesne, 12 Law J. (N. S.)

Necessity of puting in some answer, though not rogatory.

If a bill requires a defendant to answer, but he is not required to answer any of the interrogatories by a note at the foot of the bill; in required to an such case he need not answer any of the interrogatories, but he must put in some answer: for he is only exempted from giving a discovery of facts, and not from stating his line of defence. Wilson v. Jones, 7 Jur. 1102, V. C. E.

(3) See Janson v. Solarte, 2 Y. & C. Ex. 132.

Answer as to irrelevant matter.

The rule that where a defendant submits to answer, he must answer fully, does not apply in such a way as to oblige a defendant to discover that which would be altogether immaterial to the relief sought by the bill. (Wood v. Hitchings, 3 Beav. 504; Codrington v. Codrington, 3 Sim. 519.) For he need not answer at all as to such irrelevant matter; or, if it is desirable for his own interest, he may answer only as to a part of it. Wood v. Hitchings, 3 Beav. 504.

Where an information, after alleging a misapplication of certain

discovery, either because he cannot prove the facts, or in aid of proof, and to avoid expense (e). He is also entitled to a discovery of matters necessary to substantiate the proceedings, and make them regular and effectual in a court of equity (f). However, if the discovery sought by a bill is matter of scandal (1), or will subject the defendant to any pain, penalty, or forfeiture (2), he is not bound to

(e) 2 Atk. 241.

(f) 2 Ves. 492; 6 Ves. 37, 38, Coop. R. 214.

funds vested in the defendants upon certain trusts, alleges that there are certain other funds vested in the defendants upon the like trusts, but it does not charge any misapplication of such other funds, or any thing which can show that the interference of the court is necessary with respect to them, the allegation as to the last-mentioned funds is irrelevant, and therefore need not to be answered. Attorney Gen. v. Merchant Tailor's Company, 5 Sim. 328.

(1) Where new matter which occurred subsequently to the filing Removing scanof an original bill is improperly introduced by amendment, instead of by originally introduced by amendment, instead of by a supplemental bill, and that matter contains scandalous imputations on ment. the character of the defendant, the defendant may answer that matter in order to clear his character, without preventing the bill from being dismissed with costs on the ground of the irregularity of introducing the new matter by amendment. Wray v. Hutchinson, 2 M. & K. 235.

(2). A defendant is not only not bound to answer any question which has a direct tendency to criminate him, but he is not bound to answer any question the answer to which may form a link in the ing to criminate chain of evidence. Southall v. ____, 2 Coll. Ex. Eq. 308.

Exemption defendant to a forfeiture.

A defendant is not obliged to answer so as to expose himself to a forfeiture. So that an heir at law is not obliged to answer interrogatories as to the testator's sanity, where there is a clause in the will revoking an annuity in the event of the heir disputing his will or his competency to make it. And he may avail himself of this exemption although he answers in part, and in so doing he may have made admissions which subject him to the operation of the revocation clause. Cooke v. Turner, 14 Sim. 218.

And so a husband who obtained his marriage license by falsely swearing that the parent's consent to the marriage was given, may by answer decline answering questions relating to the minority of the make it (g); and if he does not think proper to defend himself from the discovery by demurrer or plea, according to the circumstances of the case, he has been permitted by answer to insist that he is not obliged to make the discovery (h). In this case

(g) 15 Ves. 378; and see authorities cited above, p. 228 (1).

(h) 3 P. Wms. 238; Finch v. Finch, 2 Ves. 491; Honeywood v. Selwin, 3 Atk. 276; Paxton v.

2 Ves. Jun. 454; S. C. 4 Bro. C. C. 322; 15 Ves. 378; 1 Ball & B. 325; and see Lord Radcliffe v. Parkyns, 6 Dow P. C. 230; but see Ovey v. Leighton, 2 Sim. & Stu. 234). Douglas, 19 Ves. 225; Parkhurst v. It seems that in every other case, Lowten, 1 Meriv. 391; 1 Swanst. even in that of a mere witness being 192, 305 (2). It has also been held, made a defendant (see Cookson v. that a purchaser for a valuable con- Ellison, 2 Bro. C. C. 252; Cartsideration, without notice, may by wright v. Hately, 3 Bro. C. C. 238; answer protect himself from making Shepherd v. Roberts, 3 Bro. C. C. discovery of facts which might defeat 239; 7 Ves. 288; 11 Ves. 42; but his enjoyment. (Jerrard v. Sanders, see Newman v. Godfrey, 2 Bro. C. C.

lady, and the non-consent of her parent, in an information under the Marriage Act, 4 Geo. IV. c. 76, s. 23, praying for a declaration that he has forfeited his interest in his wife's property: for such a case is within the general rule as to forfeiture. Attorney Gen. v. Lucas, 2 Hare, 566.

But a party cannot protect himself from discovering whether the consideration of a security on which he has brought an action against the plaintiff in equity was money lent at play, although the stat. 9 Anne, c. 14, s. 1, makes securities for money so lent void; for such a discovery does not subject the defendant in equity to a penalty or forfeiture, but merely prevents him from succeeding in his action. Sloman v. Kelley, 4 Y. & C., Eq. Ex. 169.

Where the interrogatories of a bill relate to matters as to which the plaintiff is entitled to a discovery, and also to other matters an admission of which would subject the defendant to an indictment or penalties, and which do not form the foundation of any part of the relief which is prayed, and the two subjects are so mixed in the interrogatories that the defendant cannot separate them in his answer, the plaintiff cannot insist upon an answer to any part of the interrogatories, Earl of Lichfield v. Bond, 12 Law J. (N. S.) 329, M. R.

- (1) [And also page 195, ante; Livingston v. Harris, 3 Paige's C. R. 528.
 - (2) [And see Culyer v. Bogert, 3 Paige's C. R. 186.]

Answer to interrogatories in which matters as to which the defendant is not obliged to answer are mixed up with others.

the plaintiff may except to the defendant's answer

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332), unless perhaps he be a profes- to answer all the facts stated in the sought of matters confidentially com-

sional person, and the discovery he bill, from which he does not distinctly protect himself from answering by municated to him (1). Stratford v. either of the other modes of defence Hogan, 2 Ball & B. 164; if a person (2). See Dolder v. Lord Huntinganswers at all, he may be required field, 11 Ves. 283, in which the ear-

(1) As the cases respecting privileged communications and documents, and respecting matters relating to the defendant's title, which have been specially noticed by Lord Redesdale, and those upon the same subject which have been adjudged during the period to which the editor's labors are confined, embrace only a portion of that subject; and as that subject is of considerable extent, and involved in much controversy and difficulty, and comprises many cases which are more properly practice cases than cases on pleading, the editor deems it advisable to refer the reader to the learned works on Discovery by Sir James Wigram and Mr. Hare, and to Mr. Daniell's valuable Treatise on Chancery Practice, in which (as the editor believes) a complete view of the points referred to in this note may be obtained. A statement of some decisions only might tend to mislead. Of the cases on privileged communications and documents, within the last twenty years, the following may, however, be named: Flight v. Robinson, 8 Beav. 22; Holmes v. Baddeley, 6 Beav. 521; Steele v. Stewart, 13 Sim. 533, and 1 Phil. 471; Mayor and Corporation of Dartmouth v. Holdsworth, 10 Sim. 476; Garland v. Scott, 3 Sim. 396; Mad n v. Veevers, 7 Beav. 489; Hughes v. Garnons, 6 Beav. 352; Desborough v. Rawlins, 3 My. & C. 515; Greanleaf v. King, 1 Beav. 137; Woods v. Woods, 4 Hare, 83; Preston v. Carr, 1 Y. & J.; Greenough v. Gaskell, 1 M. & K. 100; Earl of Glengall v. Frazer, 2 Hare, 99, 105; Att. Gen. v. Lucas, 2 Hare, 566; Clagett v. Phillips, 2 Y. & C. Ch. C. 82; Herring v. Cloberry, 1 Phil. 91, 93; Lord Walsingham v. Goodriche, 3 Hare, 122; Bolton v. Corporation of Liverpool, 1 M. & K. 95; Hughes v. Biddulph, 4 Russ. 190.

(2) By the 38th order of Aug. 1841, "a defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

Where a bill seeks to set aside an agreement for the purchase of a Discovery of a secret, on the ground of fraud and of the defendant possessing no such swer to abill for secret, the defendant cannot demur to such of the interrogatories as setting aside the seek a discovery of the nature of the secret, although by the agree- of.

as insufficient; and upon that exception it will be

ier cases are cited. Faulder v. Stuart, 6. See, however, the distinction 372; Somerville v. Mackay, 16 Ves. B. 323; 3 Madd. 70; — v. Harrison, 4 Madd. 252, and 1 Sim. & Stu.

11 Ves. 296; Shaw v. Ching, 11 taken below, pp. 369, 370, 312, be-Ves. 303; Rowe v. Teed, 15 Ves. tween the cases in which the defendant by answer denies the title of the 382; Leonard v. Leonard, 1 Ball. & plaintiff, in respect of which the discovery is sought, and these in which he thereby denies the validity of the

ment, as stated in the bill, both parties covenant that they will not divulge or make known the secret; and although the defendant, in his answer to the remainder of the bill, denies all fraud, and insists on the efficacy of the secret process, and that he had communicated the secret to the plaintiff. For the defendant is bound to discover the nature of the secret, because a disclosure is necessary even for the trial of the case; inasmuch as the only mode in which such fraud can be established, is, by comparing that which the defendant alleges to be his secret with that which was commonly or previously known to other persons. Carter v. Goetze, 2 Keen, 581.

Necessity for answering fully.

Prior to the 38th order of August, 1841, it was a rule that he who answered at all must answer fully, so that a defendant who did not protect himself from answering by plea, on the ground that he was a purchaser for valuable consideration without notice, but submitted to answer in part, could not protect himself, on the ground of his purchase, from answering fully. Ovey v. Leighton, 2 S. & S. 234. And if a defendant was interrogated as to whether he had purchased certain judgments, and if so, for what considerations, and he did not demur or plead, but admitted by answer that he purchased such incumbrances; he could not refuse to discover what he gave for them, although he said that he was a purchaser for valuable consideration, without notice of the plaintiff's equity. Lancaster v. Evers, 1 Phil. 349.

By the 38th order of Aug. 1841, "a defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer."

According to some decisions, this order applies where the bill is generally demurrable, as well as to a case where a demurrer would lie to a particular question. Fairthorne v. Weston, 3 Hare, 393. So that a defendant, having answered part of a bill, may protect himself from answering another part comprising any number of interrogatories he pleases, on the ground that he might have protected himself from answering that other part by demurrer to the whole bill. Mason v. Wakeman, 10 Jur. 628; Drake v. Drake, 2 Hare, 647.

determined whether the defendant is or is not obliged to make the discovery (i) (2). If the defence

ground upon which that title is alleged by the plaintiff to be founded; Jun. 294, note. and see below, p. 377, note (q) (1).

But according to the case of Baddeley v. Curwen, this order does not extend to the case of interrogatories objectionable only on the ground that a demurrer to the whole bill, if filed in time, would have been sustainable: for, if it did, it would throw on the master the obligation of deciding whether a bill is or is not open to a general demurrer—an obligation that seems not to have belonged to his office. 2 Coll. 151.

The 38th order applies even where the only ground of demurrer is that the suit is defective for want of parties. Kaye v. Wall, 4 Hare, 127.

If specific relief is prayed, in addition to discovery in aid of a defence to an action at law, the defendant is not bound to give any discovery which is not incidental to the relief sought by the bill, and which can only be used at law; because the discovery would be obtained without paying that price for it, namely, the costs of the suit, which, in the case of a pure bill of discovery, the plaintiff is required to pay. Desborough v. Curlewis, 3 Y. & C. Eq. Ex. 175; Jones v. Maund, 3 Y. & C. Eq. Ex. 357.

One set of defendants are not bound to answer questions upon the cases of other defendants. Tomlinson v. Swinnerton, 2 Jur. 393, V. C. E.

A partner resident in England of a foreign firm is not bound to set forth a schedule of books, &c., relating to the business of such firm, and in their custody; because their production could not be enforced. *Martineau* v. Cox, 2 Y. & C. 638.

Where one of the assignees of a bankrupt, states by way of answer to a bill, that he only acted as assignee in some trifling particulars not connected with the matters in the bill mentioned, and that he is wholly ignorant of the matters set forth in the bill, and cannot make any other answer thereto as to his knowledge, belief, or otherwise, this answer is sufficient. Jones v. Wiggins, 2 Y. & J. 385.

- (1) [Also Desplaces v. Goris, 1 Edwards' V. C. Rep. 350; Whitney v. Belden, ib. 386; and see all the cases on this subject well digested in note (1) to Sweet v. Young, in 1 vol. Blunt's edition of Ambler.]
- (2) [By the 38th Rule of the N. Y. Chancery, exceptions to answer in an injunction cause must be filed within ten days after the defendant has answered: otherwise, it will not stay a motion to dissolve the injunction. But this rule, it has been decided by Chancellor Wal-

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When a defence which can be made to a bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea (k); or if it is doubtful whether as a plea it will hold; the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar, as if it had been pleaded to the bill (l). Or if the defendant can offer a matter of plea which would be a complete bar, but has no occasion to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favourable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same manner. Thus, if a purchaser for a valuable consideration, clear of all charges of fraud or notice, can offer additional circumstances in his favour, which he cannot set forth by way of plea, or of answer to support a plea, as the expending a considerable sum of money in improvements, with the knowledge of the plaintiff, it may be more prudent to set out the whole by way of answer than to rely on the single defence by way of plea, unless it is material to prevent disclosure of any circumstance attending his title. For, a defence which, if insisted on by a plea, would protect the defendant from a discovery, will not in general do so if

> (k) Chapman v. Turner, 1 Atk. (l) See Norton v. Turvill, 2 P. 54. Wms. 144.

worth, does not apply where a complainant has waived the oath to the answer. Livingston v. Livingston, 4 Paige's Ch. R. 111; and see Rule 40. Besides these rules, there are many of the same court relating to exceptions. As to filing and submitting, Rule 50: reference R. 51, 52, 53, 125, 126; master's report, R. 55, 56, 57, 60, 62; scandal and impertinence, R. 53, 57, 106; further time to answer, R. 55, 58, 59; exceptions to report, R. 62; costs, R. 58, 59, 60, 63.]

offered by way of answer (l). To so much of the $\frac{\text{Mode of answer}}{\text{ing.}}$ bill as it is necessary and material for the defendant to answer (m) he must speak directly (1), and

(1) 2 Eq. Ca. Ab. 67; Richardson much only of the bill as applies to v. Mitchell, Sel. Ca. in Cha. 51; above, p. 360, note (h.)

him. (1) Coop. R. 215. And further, with respect to materiality of answer see below, 377, note (q.)

(m) It seems, a mere trustee, incumbrancer, or heir, need answer so

(1) There is no rule that a man must either admit or deny his own Averment of igrecent facts. So that if he states that he is unable to set forth as to norance as to the his knowledge, remembrance, information, and belief, respecting the recent facts. contents or purport of an agreement entered into by him about six years before the filing of the bill, and destroyed by him some months before that time, his answer will not be deemed insufficient. Nelson v. Ponsford, 4 Beav. 41.

defendant's own

If a defendant says he is an utter stranger to a matter, and cannot Answering as to form any belief concerning the same, he answers, in effect, as to his information as well as belief. Amhurst v. King, 2 S. & S. 183.

In the absence of a particular exemption, if a defendant can give Obligation of a the discovery, he must give it; and if he cannot, he must show that he has done his best to procure the means of giving it. Taylor v. means of giving discovery. Rundell, Cr. & Phil, 104. See also Stuart v. Lord Bute, 11 Sim. 442.

Hence he is bound to inspect, and answer as to the contents of, all documents that are in his power; and all documents which a defendant has a right to inspect, provided he can enforce that right, are deemed to be in his "power;" and if they are wrongfully withheld from his inspection, he is bound to resort to legal proceedings to enforce his right to inspect them; and the court will allow him time for that purpose. Taylor v. Rundell, 1 Phil. 222. See also Attorney Gen. v. Bailiffs, &c. of East Bedford, 2 M. & K. 35.

And if a bill states a fact not denied by the answer, by which it appears that the defendant has the means of making an inquiry as to a point upon which he is interrogated, he must set forth as to his knowledge, information, remembrance, or belief, with regard to that point. Neate v. Duke of Marlborough, 2 Y. & C. Eq. Ex. 3. So that if a defendant, who acted in a transaction by his solicitor simply, is interrogated as to communications between such solicitor and the plaintiff and as to entries made by such solicitor, it is not sufficient for him to say he does not know, and is unable to answer as to his information, belief, or otherwise he must say that he has endeavored to obtain the information from such solicitor, even though the latter

without evasion, and must not merely answer the

has long ceased to be his solicitor. For the acts of the agent bind the principal; and although the plaintiff might himself make inquiries of the solicitor, and might call him as a witness, yet he is entitled to such an admission of facts from the defendant, to relieve himself from the necessity of adducing proof from other sources. Earl of Glengall v. Fraser, 2 Hare, 99. If a bill charge notice of particular fact, the answer must be to it without special interrogatory. But defendant need not answer interrogatories not warranted by some matter contained in a former part of the bill. The Mechanics' Bank of Alexandria v. Lynn, 1 Peters, 383, where a bill requires answer to pertinent interrogatories, according to knowledge, information, and belief, defendant must respond not merely to his knowledge, but information if any derived from others and his belief which all of his knowledge and information have produced. Kittredge v. Claremont Bank et al., 7 Woodbury and Minot's Rep. 1st C. U. S. 246, 247, 244.

If the interrogatory, pertinent to the charge in the bill, require defendant to answer to his belief, as well as to his knowledge, remembrance, and information, and he do not, it is not sufficient that he answer to his knowledge, but must to his information and belief, if not it is exceptionable; for the general rule is that what the defendant believes the court will believe. The plaintiff contended that where the answer is on information, he was entitled to know the precise degree of credit defendant gives to such information. Defendant is bound to answer conscientiously as to the state of his mind, whether he believes the fact or believes it highly or merely probable, or has no belief whatever as to it. The exception shows that the charges, the interrogating applicable thereto, to which the answer is responsive, the terms of the answer, verbatim, so as the court, without scrutinizing the bill and answer, may judge if it be or not insufficient.

In the case the answer was "no knowledge, information and belief, that it was not true," but defendant did not as he should state whether he believed it to be true. When defendant does not deny, but states his belief, he admits it true, or that he does not mean to controvert it. But stating he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, is not such an admission as is evidence of the fact. Defendant should answer in direct and unequivocal terms as to the state of his mind, as to every fact stated in the bill to which he is interrogated, either that he does believe the matter inquired of, or cannot form any belief, or has none concerning it; and according as the answer may be, he must state that he calls on complainant for proof, or that he admits the particular fact, or that he wants all contro-

several charges literally, but he must confess or tra-

versy concerning it. Brooks v. Byam et al., 1 Story R. 299, 300, 304, 296.

So in Tradesman's Bank v. Hyatt, 2 Edwards' V. C. R. 195, it was held, that the defendant must answer to the best of his knowledge, remembrance, information and belief. "That he has no knowledge or information whatever excepting what is derived from the bill," or "that he is utterly and entirely ignorant excepting from the information of the bill," would be sufficient; but that he has no knowledge whatever excepting what is derived from the allegations in the bill, is not a sufficient answer.

In Norton v. Wood, 5 Paige's R. 261, 262, 260, on exceptions to master's report on exceptions to answer, the court decided that, if a fact is derived from information of another, and believed, it may be stated in that form. As where a defendant says he sent his clerk for payment, who returned and informed him the complainant promised to pay in a short time, which information, the defendant believes to be true. This was an averment of a promise to pay or may be charged in this form, as defendant could not swear to it as a fact in his own knowledge.

Where defendant expressly denies that to his recollection and belief he did then and there, or ever make or enter into any agreement with, &c., that the premises should be redeemable, &c., as stated in the bill: Held, that those matters being therein directly and expressly charged on defendant, and so recent, it is not sufficient for him to deny the facts according to his recollection or belief. To such allegations under such circumstances, he was bound to make a positive and direct denial. His denial, according to his recollection or belief, must, under the circumstances, be treated in a court of equity as a mere evasion. So, where he adopts like modes of denial to other facts which rest on his own knowledge, or whether he received notice or not, appear a matter of inadvertence or mistake, but in the whole structure of the answer there is a studied choice of phraseology to escape from any direct answer to the allegations, the court will regard it as insufficient. Taylor et ux. v. Luther, 2 Sumner's C. C. Rep. 231, 228.

The rule usually laid down is, that the defendant is bound to answer every part of the substance of the statement and charges in the bill, and that every particular interrogatory, founded upon an express allegation in the body of the bill, must be answered precisely, in all its bearings and circumstances. The case of Smith v. Clark, 4 Paige, is full to the point that the charging part of the bill is not to be treated as mere surplusage, but that it must be answered. If the answer sets up affirmative matter by way of avoidance, and is not reponsive

verse the substance of each charge (n) (1). And

(n) Ord. in Ch. 28, 179, Ed. Bea.; Anstr. 64; 2 Ves. & B. 162; and see
Hind v. Dods, Barnard, 258; S. C. Hall v. Bodily, 1 Vern. 470.
2 Eq. Ca. Ab. 69; Deane v. Rastron,

to the bill, upon a traverse of the answer, all the authorities agree that the answer is not proof of such matters. But if, however, the affirmative matter in the answer is responsive to the bill, it cannot be disguised that there is considerable discrepancy in the authorities, whether upon a traverse, the answer should be received as proof or as mere pleading, to be sustained by ordinary proof like a special plea. Allen, adm. v. Mower, 17 Vermont Rep. 67.

Where the matters charged in the bill are alleged to have occurred with divers circumstances, it is not sufficient for the defendant to answer such matters, literally denying the same upon his information or knowledge with the attendant circumstances; but he must admit or answer the substance of each charge. King v. Ray, 11 Paige Ch. Rep. 235.

Evasive answer.

(1) When a defendant answers conjunctively, that he is unable to answer several things, his answer is evasive, unless he adds that he cannot answer any of them; as when he says that he cannot set forth when he parted with papers and what has become of them. Tipping v. Clark, 2 Hare, 390.

And where an information prays an account, and payment of arrears of rent out of land, and that for that purpose the lands may be ascertained and distinguished, and it charges that the defendant has in his possession deeds relating to the land and to the rent, whereby the truth of the allegations in the information would appear, and the answer denies the defendant's possession of any deeds relating to the land and the rent, or whereby the truth of the matters mentioned in the information would appear, the answer is insufficient: for the defendant is bound to state whether or not he has any deeds relating even to the land alone, for the purpose of enabling the plaintiff to identify the land, which is one link in the plaintiff's title. Attorney General v. Lord Dinorben, 2 Jur. 129, Ex. Eq. See further, Woods v. Morrell, 1 J. C.R. 103; Morris v. Parker, 3 lb. 297; Smith v. Lasher, 5 lb. 247; Pettit v. Candler, on appeal, 3 Wendell's R. 618. If a defendant submit to answer at all, he must answer fully and particularly; not merely limiting his responses to the interrogations of the bill. Hogthorp v. Hook, 1 Gill & Johns. 270; Methodist Episcopal Church v. Jacques, 1 J. C. R. 65; and see Phillips v. Provoost, 4 J. C. R. 205; Frost v. Beekman, 1 Ib. 288; Cuyler v. Bogert, 3 Paige's C. R. 186; Utica Insurance Co. v. Lynch, ib. 210; Warsfield v. Gambril, 1 Gill & Johns. 503. The complainant is entitled to answer to every fact charged in the bill, the admis-

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wherever there are particular precise charges (o), they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges

(o) These, however, it seems, to King v. Marissal, 3 Atk. 192, Duthe end mentioned in the text, must rant v. Durant, 1 Cox R. 58. be specially interrogated to (1). See

sion or proof of which is material to the relief sought, or necessary to substantiate his proceeding and make them regular. As a general rule, if the charge in the bill embraces several particulars, the answer should be in the disjunctive, denying each particular or admitting some and denying the others, according to the fact. Davis v. Mapes, 2 Paige's C. R. 105; Utica Ins. Co. v. Lynch, supra; King v. Ray, 11 Paige's C. R. 235.

A defendant must give a full, frank and explicit disclosure of all matters material or necessary to be answered, whether resting within his own knowlege or upon his information and belief. Baggot v. Henry, 1 Edwards' V. C. R. 7.

Where suspicious circumstances, gross fraud and collusion are charged in a bill, a defendant will be held to a strict rule in answering. Not only his motives, but his secret designs, his "unuttered thoughts" must be exposed. *Mechanics' Bank* v. *Levy*, ib. 316.

It is improper to incorporate in an answer to an amended bill, the whole matter of the former answer. Bennington Iron Co. v. Campbell, 2 Paige's C. R. 160. No particular form of words is necessary in an answer. It is sufficient if it be not evasive, and if the substance is preserved. Utica Ins. Co. v. Lynch, supra.

The true tests as to whether questions in a bill are to be answered or not, are: 1st, Whether the answers might lead to the crimination of the defendant; and, 2dly, Whether they are relevant and may be material to the case of the complainant. *Mant* v. *Scott*, 3 Price, 477.]

What the complainant is bound to state in his bill, must be admitted or denied by the answer. Thus when a bill for partition, not on'y the rights of the parties but the rights of the defendants as between themselves, are stated as required by the 174th Rule of New-York, and by the Revised Statutes, which require that the rights of all parties be set forth as far as they are known. A defendant in his answer must answer as to such rights either by a general admission that the rights of the several parties are as stated or in some other manner. Van Cortland v. Beekman et al., 6 Paige's R. 495-6, 492.

(1) See note to p. 92, supra.

[310] (p) (1). Thus where a bill required a general ac-

(p) 2 Eq. Ca. Ab. 67; Paxton's 792; Wharton v. Wharton, 1 Sim. case, Sel. Ca. in Ch. 53; Prout v. & Stu. 235; and see Amhurst v. Underwood, 2 Cox, R. 135; 6 Ves. King, 2 Sim & Stu. 183.

(1) [Woods v. Morrell, 1 J. C. R. 103. A defendant is not bound to answer interrogatories asking a disclosure of matter no way connected with or material to the case. Hagthorp v. Hook, 1 Gill & Johns. 270; and see Mechanics' Bank v. Levy, 3 Paige's C. R. 656.]

The charge or fact must be stated in the bill on which the interrogatory is founded, for if it be irrelevant to the matters charged, the defendant need not answer the interrogatories. Brooks v. Byam et al., 360-1. 1 Story's C. C. R. 296. The defendant must answer the charging as well as stating part, and his answer will be equally evidence in his favor if oath is not waived. Smith v. Clark and Smith, 4 Paige's R. 373, 368.

Where answer on oath is waived it is not evidence for defendant; but as a pleading complainant may avail of admissions and allegations therein, which establish the case made by his bill. The answer is not to be taken together as evidence even where it is on oath. Complainant may avail admissions in one part without being also bound by the statements and allegations in the other parts of same answer. Bartlett v. Gale et al., 4 Paige's R. 507, 503.

Where defendant in his answer "expressly charges" certain facts to be, &c., on which he intends to rely for defence, and swears to the answer, he swears to the truth of the facts, not to the fact of the charge, and if the facts stated or charged are material and not true, perjury may be assigned upon it. Quackenbush v. Van Riper, Saxton's Ch. R. 485-6, 476.

Answer of one defendant is not evidence against a co-defendant, for the plaintiff may so frame his bill and interrogatories as to elicit evidence from one defendant to charge another, and to exclude such matters as might discharge him. To admit the answer of the one to be evidence against the other under such circumstances, and when cross-interrogatories could not be admitted, would give to the plaintiff an undue advantage against the manifest principles of impartial justice. But where the answer is unfavorable to the plaintiff and consequently operates favorably for a co-defendant, this reason is not applicable. Where plaintiffs call on defendant for discovery, requiring leave to answer under oath fully to all the matters charged in the bill, they cannot be allowed to say that his answer is not testimony. The answer of a defendant responsive to the bill is evidence for co-defendant, more especially when such co-defendant being a depository of papers, and became such at request of both parties, has no interest in the question

count, and at the same time called upon the defendant to set forth whether he had received particular sums of money specified in the bill, with many circumstances respecting the times when, and of whom, and on what accounts such sums had been received, it was determined, that setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all sums of money received by the defendant, was not sufficient, and the plaintiff having excepted to the answer on this ground, the exception was allowed; the court being of opinion that the

and defends himself under the title of the other defendant. Mills v. Gore et al., 20 Pick. R. (Mass.) 34-35, 28.

It is evidence against his co-defendant where latter claims through him, or wherever the confession of a party would be good evidence against another, the answer in such case, a fortiori, may be read against the latter. It is evidence against plaintiff, even if it be doubtful whether a decree can be made against defendant. The plaintiffs cannot avail themselves of the answer of a defendant who is substantially a plaintiff. It is not evidence against a co-defendant. Field et al. v. Holland et al., 6 Cranch's R. 8-29, 2 Condens. R. 285.

With regard to the sufficiency of an answer, Sir J. Wigram, V. C., observed, in *Tipping* v. *Clarke:* "If the defendant will simply answer in the terms of the bill, he avoids all difficulty on the subject. But if, instead of doing so, he gives an answer which is not precise with reference to all the matters on which he is interrogated, and then endeavors to shelter himself under a general denial, coupled with the words 'except as aforesaid,' or similar expressions, he makes it often difficult to decide whether the answer is sufficient or not. The rule, since I have known the practice of the court, has been, that wherever the defendant denies the bill to be true, 'except as aforesaid,' or 'except as appears by the other parts of the answer,' if there be not found on the answer a clear and sufficient statement which to a reasonable extent meets the whole case, the answer is deemed to be evasive." 2 *Hare*, 383.

The court never requires a plaintiff to be satisfied with a mere general denial in answer to a specific charge. Tipping v. Clarke, 2 Hare, 389.

Sufficiency of

defendant was bound to answer specifically to the specific charges in the bill, and that it was not sufficient for him to say generally, that he had in the schedule set forth an account of all sums received by him (q) (1).

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Necessity of discovery, when denies the plaintiff's title, or that on which the materiality of the discovery depends.

Although the defendant by his answer denies the title of the plaintiff, yet in many cases he must make a discovery prayed by the bill, though not material to the plaintiff's title, and though the plaintiff, if he has no title, can have no benefit from the disco-

(q) Hepburn v. Durand, 20th Bro. C. C. 503; but see White v. Nov. 1779, in Cha.; S. C. rep. 1 Williams, 8 Ves. 193. (1)

Setting forth a settled account.

(1) A defendant is not bound to set forth a settled account, if the bill charges that if there was any settled account, the same was fraudulent and collusive, and merely prays a discovery in respect of such pretended settled account. Davies v. Davies, 1 Keen, 534.

Answer setting forth lengthy accounts and numerous documents.

A defendant is not bound to set forth accounts where they are of very great length: it is sufficient in such a case to refer to the books in which they are to be found. Nor is it necessary to specify all the documents relating to the subject, where that would occupy a schedule of an oppressive length: it is sufficient to specify the most important; and then to say that there are others contained in boxes or bundles, marked A, B, &c. Christian v. Taylor, 11 Sim. 401.

Answer setting out a banking account.

Where a banker is required to set forth the particulars of the consideration given by him for a bill of exchange, and he answers that the consideration consisted of cash, bills, and notes, drawn out of his banking house from time to time, in the regular course of dealing between a banker and his customers, this is a sufficient answer, without setting out the banking account. Webster v. Threlfall, 2 S. & S. 190.

Setting out acsory notes, cheques, &c.

A defendant may set out accounts at length, and copies of promiscounts and co-pies of promis. sory notes, undertakings, acknowledgments, and cheques, where the interrogatories in the bill appear, in effect, though not literally, to require it, and where it appears necessary to refer to them, in order duly to qualify the defendant's statements as to his knowledge of the cash transactions to which the interrogatories relate. Davis v. Cripps, 2 Y. & C. Ch. 435.

Setting forth information in columns.

Where it is necessary for the sake of perspicuity, a defendant may set forth the information required in a schedule with columns. Gompertz v. Best, 1 Y. & C. Eq. Ex. 114.

very. As if a bill is filed for tithes, praying a discovery of the quantity of land in the defendant's possession, and of the value of the tithes, though the defendant insists upon a modus, or upon an exemption from payment of tithes, or absolutely denies the plaintiff's title (r), he must yet answer to the quantity of land and value of the tithes (s). Or if a bill is filed against an executor by a creditor of the testator, the executor must admit assets, or set forth an account, though he denies the debt(t)(1).

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But where the defendant sets up a title in himself, apparently good, and which the plaintiff must remove to found his own title, the defendant is not. generally compelled to make any discovery not material to the trial of the question of title. Thus, where a testator devised his real estate to his nephew for life, with remainder to his first and other sons in tail, with reversion to his right heirs, and made his nephew executor and residuary legatee of his will, and on the death of the nephew his son entered as tenant in tail under the will; upon a bill filed by the heir at law of the testator, insisting that the son was illegitimate, that the limitations in the will were therefore spent, and that the plaintiff became entitled as heir to the real estate, and praying

⁽r) See, however, Gilb. Ca. in Cha. (t) Randal v. Head, Hardr. 188. See Sweet v. Young, Ambl. 353; 229.

⁽s) Langham v. ----, Hardr. 11 Ves. 304.

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⁽¹⁾ If a bill is filed by persons claiming to be next of kin, against the administrator, praying the usual accounts, he must set them forth, making discovery, though plain-although by his answer he denies that the plaintiffs are next of kin, tiff's tile be denied. and he himself claims to be one of the next of kin. Dott v. Hayes, 10 Jur. 628.

Necessity for

an account of the personal estate, and application thereof in discharge of debts and incumbrances on the real estate, the defendants against whom the account was sought insisted on the title of the son as tenant in tail under the will, and that they were not bound to discover the personal estate until the plaintiff had established his title. Exceptions having been taken to the answer, and allowed by the master, on exception to his report, the exceptions to the answer were overruled; the court distinguishing this case, which showed a primâ facie title in the defendant, the son of the nephew, from a mere denial of the plaintiff's title (u).

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So when a bill claimed the tithe of rabbits on an alleged custom, and the defendant denied the custom, it was determined that the defendant was not bound to set forth an account of the rabbits alleged to be tithable (x); and a like determination was made upon a claim of wharfage, against common right, the title not having been established at law (y).

But where a discovery is in any degree connected with the title, it should seem that a defendant cannot protect himself by answer from making the discovery; and in the case of an account required, wholly independent of the title, the court has declined laying down any general rule (z), deciding ordinarily upon the circumstances of the particular case. Thus, to a bill stating a partner-

⁽u) Gethin v. Gale, 29th Oct. 1739, in Chan. M. R.; Ambl. 354, cited in Sweet v. Young. See also Gunn v. Prior, cited 11 Ves. Jun. 291; S. C. Dick. 657; 1 Cox R. 197.

⁽x) Randal v. Head, Hardr. 188;S. C. Eq. Ca. Ab. 35.

⁽y) Northleigh v. Luscombe, Ambl. 612.

⁽z) Hall v. Noyes, Ld. Chan. 13th March, 1792.

ship, and seeking an account of transactions of the alleged partnership, the defendant by his answer denied the partnership, and declined setting forth the account required, insisting that the plaintiff was only his servant; and the court, conceiving the account sought not to be material to the title, overruled exceptions to the answer, for not setting forth the account (a). And where a plea has been ordered to stand for an answer, with liberty to except to it as an insufficient answer, the court has sometimes limited the power of excepting, so as to protect the defendant from setting forth accounts not material to the plaintiff's title, where that title has been very doubtful (b).

If an answer goes out of the bill to state some Scandal and impertinence. matter not material to the defendant's case, it will be deemed impertinent (2), and the matter upon

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(a) Jacobs v. Goodman, in Exch. 16th Nov. 1791; S. C. rep. 3 Bro. C. C. 487, note; and 2 Cox R. 282. See Hall v. Noyes, 3 Bro. C. C. 483; Marquis of Donegal v. Stewart, 3 Ves. 446; Phelips v. Caney, 4 Ves. 107; 11 Ves. 42, 293; Webster v. Bayley v. Adams, 6 Ves. 586.

Threlfall, 2 Sim. & Stu. 190; but see ____ v. Harrison, 4 Madd. 252. (1)

(b) Earl of Strafford v. Blakeway, 6 Bro. P. C. 630, Toml. Ed; King v. Holcombe, 4 Bro. C. C. 439;

Hence, if an answer to a mere bill of revivor contains long state-

^{(1) [}The principle, that a defendant who denies some substantial leading fact, which, if admitted, would entitle the complainant to relief, and who cannot be compelled to answer further until the truth of the fact is disposed of, applies only to a case of an account of partnership transactions. And even there, a general denial of the partnership will not avail, if the bill charges that it would appear by a discovery from the defendant. Desplaces v. Goris, 1 Edwards' V. C. R. 350; and see notes at pp. 308, 309, ante.]

⁽²⁾ Any matter in an answer is impertinent, except that which is Impertinence. called for by the bill, or would be material to the defence with reference to the order or decree which may be grounded on the bill to which answer is made.

application to the court, will be expunged (c). So

(c) Alsager v. Johnson, 4 Ves. 217; Norway v. Rowe, 1 Meriv.

ments introduced for the purpose of showing that the proceedings of the plaintiff have been irregular and oppressive, such statements are impertinent; because the defendant can have no advantage from them with reference to the order to revive, and his proper way of objecting to irregularity and oppression is by way of motion or petition. Wagstaff v. Bryan, 1 Russ. & My. 28.

And the answer to a bill of revivor, filed after a decree, must not go into the merits of the original cause, whether the matter he introduces existed at the time of the decree, or has arisen since. Such matter, if stated, is impertinent. Devaynes v. Morris, 1 My. & C. 213.

: But a defendant to a bill, filed to revive a sult on the occasion of an abatement caused by the death or marriage of a plaintiff, may, without impertinence, state that he, the defendant, has become bankrupt, and object that the plaintiff is not entitled to the same decree as if the defendant had not become bankrupt, although such statements do not tend to show that the plaintiff is not entitled to revive the suit. Langley v. Fisher, 10 Sim. 345.

Mere unnecessary words or passages. As a general rule, words are not impertinent because unnecessary where they are not irrelevant. Marshall v. Mellerish, 6 Beav. 558. And where a defendant is called upon to set forth a schedule of deeds in the ordinary form, and without any limitation being required or suggested by the plaintiffs, it is not impertinent to set forth the names of the parties, in addition to the date of the deed and the estate or subject to which it relates. Tench v. Cheese, 1 Beav. 571.

But when a defendant refers to a book in the plaintiff's possession, as containing the information required of him, and thereby makes that book a part of his answer, if he afterwards gives that information, it is impertinence. *Marshall* v. *Mellerish*, 6 Beav. 558.

Prolixity.

And if a bill is filed for an account of real estates, and a schedule to the answer sets forth the particulars of such estates with undue prolixity, after the manner of the description of the parcels in a deed, it is impertinent. And although there are a few passages intermixed, which are not unduly prolix, yet notwithstanding the eleventh order of 1828, a general exception for impertinence will be allowed, if a very great number of exceptions would be required in order to specify the objectionable passages. Bydev. Masterman, Cr. & Phil. 265.

Exceptions for impertinence.

Each exception for impertinence must be supported in toto, or must fail altogether; so that if any part of the matter complained of as impertinent is not so, the whole exception fails, though some part of the matter complained of is impertinent. Tench v. Cheese, 1 Beav. 571.

On this subject, see also note, p. 57, supra.

in an answer, as in a bill, if any thing scandalous is

347; French v. Jacko, ibid. 357, Madd. 51; Parker v. Fairlee, 1 Sim. note; Beaumont v. Beaumont, 5 & Stu. 295; 2 Sim. & Stu. 193 (1).

If an exception for impertinence embraces matters of the answer which are responsive to allegations in the complainant's bill as well as matters which are impertinent, the whole exception must be disallowed. Curtes v. Masten, 11 Paige's Ch. Rep. 15. When an exception to an answer for impertinence embraces matters which are proper and material to the defendant's defence, the exception will be overruled. An exception for impertinence cannot be allowed in part only. Balcom v New-York Life Insurance Company, 11 Paige's Ch. R. 454.

(1) Wagstaff v. Bryant, 1 Russ. & M. 28. Impertinence in pleading consists in setting forth what is not necessary to be set forth: as stuffing the pleadings with useless recitals and long digressions about immaterial matters. Hood v. Inman, 4 J. C. R. 437. It was said by Chancellor Kent, in Woods v. Morrell, 1 J. C. R. 103, that perhaps the best rule to ascertain whether matter be impertinent, is to see whether the subject of the allegation could be put in issue or be given in evidence between the parties. But this definition is, perhaps, hardly broad enough—for there are by-matters affecting the costs, &c., which might not be legitimately put in issue, or be made proof of as to the direct matter in controversy.

Chancellor Walworth has more clearly and fully defined what may be impertinent by showing what is not so. "If the matter of an answer is relevant, that is if it can have any influence whatever in the decision of the suit either as to the subject-matter of the controversy, the particular relief to be given, or as to the costs, it is not impertinent." Van Rensselaer v. Brice, 4 Paine's C. R. 174.

Long recitals, stories, conversations and insinuations tending to scandal are impertinent. Woods v. Morrell, supra. Counsel are to take care that a pleading "be not stuffed with repetition of deeds, writings or records, in hac verba, but the effect and substance of so much of them only as is pertinent and material to be set down; and that in brief terms, without long and needless traverses of points not traversable, tautologies, multiplication of words or other impertinences occasioning needless prolixity." Lord Coventry's order, Beames, 165; Slack v. Evans, 7 Price, 278. And see cases of impertinence given and illustrated, 1 Montague on Pleading, 200. An amended bill is not prolix, if it is a complete record, and contains all the charges in the original bill. Fitzpatrick v. Power, 1 Hogan's R. 24. The case of Willis v. Evans, 2 Ball & Beatty, 225, is not to be followed. Ib: A short sentence is not impertinent, although it contains no fact or mate-

inserted, the scandal will be expunged by order of

rial matter, and may be only inserted in an answer from abundant caution. A statement in an answer introduced to show the temper with which a bill is filed, and the oppressive course pursued by a complainant, is not impertinent : it may have an effect upon the costs. Whatever is called for by the bill or will be material to the defence, with reference to the order or decree which may be made, is proper to be retained in an answer. Desplaces v. Goris, 1 Edward's V. C. R. 350; Monroy v. Monroy, ib. 383. Bally v. Williams, 1 M'Cleland & Young, 334. If a bill against executors calls specifically and particularly for accounts in all their various details, a very voluminous schedule, containing a copy from the books of account, specifying each item of debit and credit, will not be impertinent. It seems, it would have been impertinent, if the bill had not thus called for it. Scudder v. Bogart, 1 Edwards' V. C. R. 372. And see the King v. Teale, 7 Price, 278. Copies of receipts taken by the defendants, for moneys paid and charged in account, and making an immense schedule to an answer, are impertinent. Scudder v. Bogert, supra. exception for impertinence must be supported in toto, and if it include any passage which is not impertinent, it must fail altogether. Wagstaff v. Bryan, 1 Russ. & M. 30; recognised by Chancellor Walworth, in Van Rensselaer v. Brice, 4 Paige's C. R. 174.]

If the matter of the answer is relevant, that it yet can have any influence in the decision of the suit, either as to the subject matter of the controversy, the particular relief to be given, or as to costs, it is not impertinent. Van Rensselaer v. Brice, 4 Paige's R. 174.

If matters in a joint answer furnish no valid defence as to the defendants against whom relief is prayed in the bill and can have no influence upon the decision of the court upon the question of costs, or as to the relief, if any, which might be given in the suit, they should be excepted to in the usual form as impertinent; so that the whole of each clause or allegation may be stricken out of the joint answer of both defendants. McIntyre v. Trustees of Union College, and E. Nott, 6 Paige's R. 242, 243, 239, 240.

Held, on exception to report of master on exceptions to answer, that where a statement on the answer, as to the situation, relationship and means of living of a person, evidently for the purpose of discrediting him as a witness for complainant, and which was not responsive to the bill or material to the defence, the matter was deemed irrelevant and impertinent. In a suit for relief against judgment at law, the facts on trial should be directly stated in the answer and left to be established by proof in the usual way. The judge's notes or case settled therefrom are not conclusive of the facts on the trial, and ought not to be refer-

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the court (d). But, as in a bill, nothing relevant will be deemed scandalous (e) (1).

2. An answer usually begins (2) by a reservation to the defendant of all advantage which may be Form of an antaken by exception to the bill, a form which has [314] probably been intended to prevent a conclusion that the defendant, having submitted to answer the bill. admitted every thing which by his answer he did not expressly controvert, and especially such matters as he might have objected to by demurrer or plea. The answers to the several matters contained in the bill, together with such additional matter as may be necessary for the defendant to show to the court, either to qualify or add to the case made by the bill, or to state a new case on his own behalf, next follow (3), with a general denial

(d) Peck v. Peck, Mos. 45; Barnes v. Saxby, 3 Swanst. 232, n. Smith v. Reynolds, Mos. 69; Ord. (e) Mosely. 70; 1 Ball & B. 61; in Cha. 25, Ed. Bea.; Corbett v. and see Lord St. John v. Lady St. Tottenham, 1 Ball & Bea. 61; John. 11 Ves. 526.

red to and made part of the answer. Repetitions of the same matters in the answer, render repetitions impertinent and exceptionable. Where the same exception embraces matter which is pertinent and matter impertinent, as the whole cannot be sustained, the exception must be overruled. When part of the answer contains a part not material to defendant's defence, but therein states a fact which might be material if put in proper form, but is so mixed up with irrelevant and impertinent matters which ought not to have been stated that it is impossible to separate it therefrom, the whole exception must be allowed. ton v. Wood and another, 5 Paige's R. 260, 264.

(1) See note to p. 58, supra.

(2) If a plaintiff dies before an answer is put in, and the defendant Title of an answer filed after intitules his answer, "The answer of — to the original bill of since deceased," it will be ordered to be taken off the file for irregularity in the title. Upton v. Lowten, 10 Law J. (N. S.) 222, V. C. E.

(3) An answer must not set up two alternative inconsistent defences. Jesus College, Oxford v. Gibbs, 4 Law J. (N. S.) Ex. 42.

Setting up inconsistent defences.

of that combination which is usually charged in a bill (f). It is the universal practice to add by way of conclusion a general traverse or denial of all the matters in the bill. This is said (g) to have obtained when the practice was for the defendant merely to set forth his case, without answering every clause in the bill. Though, perhaps, rather impertinent if the bill is otherwise fully answered, and it has been determined to be in that

(f) See above, p. 43 (1).

(g) 2 P. Wms. 87.

Answer of a stakeholder.

Where a mere stakeholder, in his answer, submits that the plaintiff is not entitled to the relief prayed, and that the bill ought to be dismissed with costs, he thereby interferes more than is necessary; and, therefore, if the plaintiff gets a decree in his favor against the principal defendant, there will be a decree as to the shareholder, with costs. Whereas, if he only submits in his answer that the bill ought to be dismissed as against himself merely, with costs, no costs will be given as against him. Osbaldiston v. Simpson, 13 Sim. 513.

old trustees.

Where new trustees of a charity, appointed after the old trustees trustees after decree against the have put in their answer to an information, but before the decree, are not made parties to the cause; and after the decree, a supplemental information is filed against such new trustees, they are not so bound by the decree as to be precluded from making a case by way of defence to the suit, for they come in under the founder, and not under the trustees for whom they were substituted, and they could have made a separate defence, had they been made parties to the suit, as they ought to have been, before the decree. Att. Gen. v. Foster, 2 Hare, 81.

Answer to an original information in the nature of a supplemental one, against a new master and ush-er of a school.

A new master and usher of a school are not so bound by a decree against their predecessors, as to be precluded from stating new matters in answer to an original information in the nature of a supplemental one, to show that the decree ought not to be carried into effect against them; for they do not come in by any sort of privity with their predecessors; and although the decree in the original cause may be right with reference to the things alleged and proved in that cause, yet there may be circumstances showing that it would not be right to prosecute it against the new officers. Att. Gen. v. Foster, 13 Sim. 282.

(1) [A defendant cannot avail himself of matter of defence which appears only upon his evidence and was not stated in his answer. Stanly v. Robinson, 1 Russ. & M. 527.]

case unnecessary (h), it is still continued in practice (1). In the case of an infant (2) the answer is expressed to be made by his guardian (g); and the general saving at the beginning, together with the denial of combination, and the traverse at the conclusion, common to all other answers, are omitted. For an infant is entitled to the benefit of every exception which can be taken to a bill, without expressly making it; he is considered as incapable of the combination charged in the bill; and his answer cannot be excepted to for insufficiency (h). The answer of an idiot or lunatic is expressed to be made by his committee as his guardian, or by the person appointed his guardian by the court to defend the suit (i). An answer must be signed by counsel (k), unless taken by commissioners in the country under the authority of a commission issued for the purpose; in which case the signature

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- (h) 2 P. Wms. 87.
- (g) See above, p. 124.
- (h) Copeland v. Wheeler, 4 Bro. chequer, 30 June, 1813.
- 274: 1 Ball & B. 553. It has been determined also, that the answer of

the attorney-general cannot be excepted to. Davison v. Att. Gen. Ex-

- C. C. 256; Lucas v. Lucas, 13 Ves. (i) See above, p. 124.
 - (k) 2 Ves. & B. 358.

⁽¹⁾ The general traverse is constantly omitted by some draftsmen of the present day. [The general denial of all the matters of the bill not before answered, with which an answer usually concludes, is sufficient as a pleading to put the several matters of the bill in issue. Chancellor Walworth, in Stufford v. Brown, 4 Paige's C. R. 88; and see Storms v. Storms, 1 Edwards' V. C. R. 358.

⁽²⁾ In order to enable an infant defendant to enter into evidence in Infant's answer, support of facts, he should state them in his answer, instead of putting in the common answer of an infant, if those facts would not otherwise be in issue in the cause. But whatever admissions he may make, or whatever points may be tendered in issue in his answer, the plaintiff is not in any degree exonerated from proving, as against the infant, the whole case upon which he relies. Holden v. Hearn, 1 Beav. 445.

by counsel is not required (l), the commissioners being responsible for the propriety of its contents, as it is supposed to be taken by them from the mouth of the defendant, which in fact was formerly done (m).

Insufficiency of answer.

3. If a plaintiff conceives an answer to be insufficient to the charges contained in the bill he may take exceptions to it, stating such parts of the bill as he conceives are not answered, and praying that the defendant may in such respects put in a full answer to the bill (n) (1). These exceptions

(l) 3 Atk. 440.

437, and the cases there referred to,

(m) See Brown v. Bruce, 2 Meriv. 1.(n) See Marsh v. Hunter, 3 Madd.

in note; Hodgson v. Butterfield, 2 Sim. & Stu. 236.

(1) [Exceptions to an answer cannot be sustained, unless there is some material allegation, charge or interrogatory contained in the bill, which has not been fully answered. And where new matter, not responsive to the bill, is stated in the answer, if such new matter is wholly irrelevant, and forms no sufficient ground of defence, the complainant may except to the answer for impertinence, or may raise the objection at the hearing. This extract is taken from the opinion of Chancellor Walworth, in the case of Stafford v. Brown, 4 Paige's R. 88; and his honor, in that opinion, still further shows, by referring to Mitford, 315, Cooper's Pl. 319, 1 Newland's P. 259, and Lube's Equity Pl. 87, how the exception must have reference to some part of the bill. Although it may not be necessary, in the exceptions, to state the precise words of the allegation, charge or interrogatory in the bill which is not fully answered, yet the substance, at least, must be stated: so that, by reference to the bill alone, in connection with the exception the court may see that the particular matters as to which a further answer is sought are stated in the bill, or that such answer is called for by the interrogatories. Per Ch. Walworth, in the same case, referring to Hodgson v. Butterfield, 2 Sim. & Stu. 236. Material and necessary matter must be explicitly met in an answer: but exceptions, founded upon verbal criticism, slight defect and omission of immaterial matter, will be invariably disallowed and treated as vexatious. Bogart v. Henry, 1 Edwards' V. C. R. 7. See a reference to the New-York Rules which relate exceptions, in note at page 308, ante.]

Exceptions to report will be overruled with costs, if any of the

must be signed by counsel (n), and are then delivered to the proper officer, which must be done

(n) Candler v. Partington, 6 Madd. 102; Yates v. Hardy, 1 Jac. R. 223

exceptions allowed by the master were well taken. But where exceptions for impertinence would mutilate the answer by breaking up sentences or clauses, which ought to stand or fall together, or where the allowance of an exception to part of a clause or sentence, would wholly change the meaning of what remains or make it unintelligible, the exceptions are to be disallowed. Franklin v. Keeler, 4 Paige's R. 382, 383.

Where a further answer is called for by exceptions, if defendant find he has neglected to answer any thing that he was called upon by the bill to discover, he may in answering the exceptions make his answer perfect; although the exceptions do not cover the whole ground upon which the original answer might have been objected to for insufficiency. It seems also that he may in such further answer set up any new matter of defence, although not responsive to the bill, which has arisen since the filing of the original answer. Alderman v. Potter, 6 Paige's R. 660. 558.

Liberty to except to an answer for insufficiency, is never granted, where an answer on oath is waived by the complainant's bill. *McCormick* v. *Chamberlain*, 11 Paige's Ch. R. 543.

An exception to an answer for insufficiency should state the charges in the bill, the interrogatory applicable thereto, to which the answer is responsive, and the terms of the answer, verbatim, so that the court may see whether it is sufficient or not. Brooks v. Byam, 1 Story's C. C. R. 296.

A defendant cannot in his answer to the bill excuse himself from making a full discovery by merely denying the complainant's title to discovery and relief; as the complainant is entitled to a discovery of all matters which will be essential to the relief claimed, in case he should succeed in showing that the particular defence set up in the answer is false or unfounded. It is a general rule of pleading in chancery, that the defendant cannot by answer excuse himself from answering; and that if he attempts to make his defence by answer, instead of by plea or demurrer, he must answer the whole of the statements and charges contained in the bill, and all the interrogatories properly founded upon them, so far as they are necessary to enable the complainant to have a complete decree in case he succeeds in the suit. To this general rule there are a few well established exceptions. Bank of Utica v. Messereau, 7 Paige's Ch. R. 517.

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within a limited time, according to the course of the court (0), though upon application further time is allowed for the purpose, within certain restrictions (p). If the defendant conceives his answer to be sufficient, or for any other reason does not submit to answer the matters contained in the exceptions, one of the masters of the court is directed to look into the bill, the answer and the exceptions, and to certify whether the answer is sufficient in the points excepted to or not (q). If the master reports the answer insufficient in any of the points excepted to, the defendant must answer again to those parts of the bill in which the master conceives the answer to be insufficient; unless by excepting to the master's report he brings the matter before the court, and there obtains a different judgment (r) (1). But if the defendant has insisted on any matter as a reason for not answering, though he does not except to the master's report, yet he is not absolutely precluded from insisting on the same matter in a second answer (s), and ta-

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lyn, 6 Ves. 823.

⁽p) Anon. 3 Atk. 19; 14 Ves. 536; Baring v. Prinsep, 1 Madd. 526.

⁽q) Ord. in Cha. 53, Ed. Bea.; Partridge v. Haycraft, 11 Ves. 570; 11 Ves. 577; 1 Ves. & B. 333. As to the right of the masters to exercise a discretion with regard to the materiality of interrogatories not answered, see Agar v. Regent's Canal Comp.

⁽o) 3 Atk. 19; Thomas v. Llewel- Coop. R. 212; Hirst v. Pierce, 4 Pri. Ex. R. 339; Scott v. Mackintosh, 1 Ves. & B. 503; Amhurst v. King, 2 Sim. & Stu. 183.

⁽r) Anon. 3 Atk. 235; Hornby y. Pemberton, Mos. 57; Worthington v. Foxhall, 3 Barnard, 261; Finch v. Finch, 2 Ves. 491; 11 Ves. 577.

⁽s) Finch v. Finch, 2 Ves. 491. See Ovey v. Leighton, 2 Sim. & Stu.

⁽¹⁾ As to the conditions, character and form of exceptions to master's report, on reference for any purpose, and as regarded by the Supreme Court of U.S., see Story v. Livingston, 13 Peters, 359.

king the opinion of the court whether he ought to be compelled to answer further to that point or not (t).

Where a defendant pleads or demurs to any part of the discovery sought by a bill, and answers likewise, if the plaintiff takes exceptions to the answer before the plea or demurrer has been argued, he admits the plea (u) or demurrer (x) to be good; for unless he admits it to be good it is impossible to determine whether the answer is sufficient or not. But if the plea or demurrer is only to the relief prayed by the bill, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the plea or demurrer is argued (y). If a plea or demurrer is accompanied by an answer to any part of the bill, even a denial of combination merely, and the plea or demurrer is overruled, the plaintiff must except to the answer as insufficient (z) (2). But if a plea or demurrer is filed without any answer, and is overruled, the plaintiff

- (t) As to the practice in case the defendant should put in successively as many as four insufficient answers, see Farquharson v. Balfour, 1 Turn. R. 184 (1).
- (u) See Darnell v. Reyny, 1 Vern.
 - (x) See Boyd v. Mills, 13 Ves. 85,
- (y) 3 P. Wms. 327, note S. See however 2 Atk. 390.
 - (z) Cotes v. Turner, Bunb. 123.

⁽¹⁾ When the court have once ordered the respondents to answer more fully on such matters, and exceptions are taken and sustained again to omissions or evasions, the court will not allow the answers to be amended without cost, to be followed by harsher measures, if the omissions are repeated. Kittridge v. Claremont Bank, 1 Minot and Wood, C. C. R. 244.

⁽²⁾ Where demurrer is accompanied by answer, although such answer denies combination and the demurrer is overruled, if complainant wants a further answer, he must except to the answer for insufficiency. Many v. Beekman Iron Co., 9 Paige's R. 196, 188.

need not take exceptions, and the defendant must answer the whole bill as if no defence had been made to it (a).

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Further answers and answers to amended bills.

A further answer is in every respect similar to, and indeed is considered as forming part of, the first answer. So an answer to an amended bill is considered as part of the answer to the original bill (b). Therefore if the defendant in a further answer, or an answer to an amended bill, repeats anything contained in a former answer (c), the repetition, unless it varies the defence in point of substance, or is otherwise necessary or expedient, will be considered as impertinent (d); and if upon reference to a master such parts of the answer are reported to be impertinent, they will be struck out as such, with costs, which in strictness are to be paid by the counsel who signed the answer (e).

Disclaimers.

4. A defendant may disclaim all right or title to the matter in demand by the plaintiff's bill, or by any part of it (f). But a disclaimer cannot often be put in alone. For if the defendant has been made a party by mistake, having at the time no interest in the matter in question, yet as he may have had an interest which he may have parted

⁽a) Ibid. As to the practice with reference to the obtaining of time to answer in such a case, see Trim v. Baker, 1 Sim. & Stu. 469; S. C. on appeal, 1 Turn. R. 253, in accordance with Jones v. Saxby, mentioned 1 Swanst. 194, note (a), and overruling Griffith v. Wood, 1 Ves. & Bea. 541. (b) 3 Atk. 303; Dick. 583; Spurrier v. Fitzgerald, 6 Ves. 548; and

see Ovey v. Leighton, 2 Sim. & Stu. 234.

⁽c) Smith v. Serle, 14 Ves. 415.

⁽d) 3 Atk. 303 (1).

⁽e) Ord. in Cha. 167, Ed. Bea.; 16 Ves. 234.

⁽f) See Archbold v. Borrold, Cary R. 69; Seton v. Slade, 7 Ves. 265.

^{(1) [}Bennington Iron Co. v. Campbell, 2 Paige's C. K. 160.]

with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not; and, if the defendant has had an interest which he has parted with, an answer may be also necessary to enable the plaintiff to make the proper party, instead of the defendant disclaiming (1). The form of a disclaimer alone seems to be simply an assertion that the defendant disclaims all right and title to the matter in demand, and in some instances,

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(1) A defendant cannot shelter himself from the necessity of put- Necessity of a ting in a full answer, by disclaimer of all interest in the matters in the accompanied by suit, where, although he may have no interest but may have assigned an answer. all his interest, yet he is accountable to the plaintiff or to a co-defendant: for a man cannot disclaim his liability. Glassington v. Thwaites 2 Russ. 458. [And a defendant cannot get rid of the effect of his disclaimer, except upon a distinct application, supported by affidavits establishing special ground. Sidden v. Lediard. 1 Russ. & M. 111.]

On application by complainant to take defendant's disclaimer and answer off the files, it was held that defendant by disclaimer cannot deprive complainant of the right of a full answer, unless it is evident defendant ought not after such disclaimer to be continued a party. When complainant is entitled to answer, and defendant puts in a simple disclaimer, the only remedy is to move to take the disclaimer off the files, exceptions cannot be filed to it. But where the disclaimer is accompanied by an insufficient answer, the proper course appears to be to except to the answer on the ground of its insufficiency. If a corporation is made a party to a suit in which it has no interest and ought not to have been made a party, an officer of the corporation who has no personal interest, and is not charged with any fraud or misconduct, cannot be compelled to answer matters as to which he is a mere witness. Ellsworth v. Curtis et al., 10 Paige's R. 107-8, 105.

And where a bill seeks to compel trustees to pay a fund to the plaintiff, and prays that the costs of the suit may be paid by other defendants, on the ground that they had rendered the suit necessary by setting up a claim to the fund, and the bill contains divers allegations in support of that fact; it is not sufficient for them to put in what they call an answer and disclaimer, merely stating that they do not claim, and never claimed, any interest in the fund; for they must answer every allegation which goes to show that a claim was set up. Graham v. Coape, 3 My. & C. 638.

from the nature of the case, this may perhaps be sufficient; but the forms given in the books of practice are all of an answer and disclaimer (1).

If the defendant disclaims, the court will in general dismiss the bill as against him with costs. it has been said, that if the plaintiff shows a probable cause for exhibiting the bill, he may pray a decree against the defendant, upon the ground of the disclaimer (h). Where the defendant disclaims, the plaintiff ought not to reply (i).

381 Making different defences to the same bill.

A defendant may demur to one part of a bill, plead to another, answer to another, and disclaim as to another. But all these defences must clearly refer to separate and distinct parts of the bill. For the defendant cannot plead to that part to which he has already demurred; neither can he answer to any part to which he has either demurred or pleaded (k) (2); the demurrer demanding the judgment of the court whether he shall make any answer, and the plea whether he shall make any other answer than what is contained in the plea.

[320] Nor can the defendant by answer claim what by

⁽h) Prac. Reg. 175, Wy. Ed.

⁽i) Prac. Reg. 176, Wy. Ed.; 3 (k) 2 Bro. Parl. Ca. 20, 21.

^{(1) [}Though a disclaimer is in substance distinct from an answer. yet it generally adopts in most respects the formal parts of an answer the words of course preceding and concluding an answer being used in a disclaimer. Cooper, 311.]

⁽²⁾ See note, page 248, supra.

[[]Clark.v. Phelps, 6 J. C. R. 214. In mortgage cases, within the court of chancery of the State of New-York, where a defendant has written notice of the suit and appears and disclaims, he shall not recover costs, but shall pay costs to the complainant. 133d Rule; and in connection, see Rule 132.]

disclaimer he has declared he has no right to (l). A plea (m) or answer (n) will therefore overrule a demurrer, and an answer (o) a plea (2); and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.

- (l) See the case of Seton v. Slade,7 Ves. 265.
- (m) Dormer v. Fortescue, 2 Atk. 282; 3 P. Wms. 80, 81; Arnold's case, Gilb. For. Rom. 59.
- (n) Abraham v. Dodgson, 2 Atk. 157; 3 P. Wms. 81; Sherwood v. Clack, 9 Pri. Ex. R. 259 (1).
- (o) Pierce v. Johns, Bunb. 11; Cottington v. Fletcher, 2 Atk. 155; 3 P. Wms. 81; Dobbyn v. Barker, 5 Bro. P. C. 573, Toml. Ed.; Earl of Clanrickard v. Bourke, 6 Bro. P. C. 4 Toml. Ed.; 1 Sim. & Stu. 6; Watkins v. Stone, 2 Sim. & Stu. 560.

^{(1) [}Bolton v. Gardner, 3 Paige's C. R. 273.]

⁽²⁾ See note, p. 248, supra.

CHAPTER THE THIRD.

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OF REPLICATIONS AND THEIR CONSEQUENCES.

A REPLICATION is the plaintiff's answer or reply to the defendant's plea or answer. Formerly, if the defendant by his plea or answer offered new matter the plaintiff replied specially (a); otherwise the replication was merely a general denial of the truth of the plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. The consequence of a special replication was a rejoinder, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication (b). If the parties were not then at issue by reason of some new matter disclosed in the rejoinder which required answer, the plaintiff might surrejoin to the rejoinder, and the defendant might in like manner ad-surrejoin, or rebut, to the surrejoinder (c). The inconvenience, delay, and unnecessary length of pleading, arising from these various allegations on each side (d) occasioned an alteration in the practice. Special replications, with all their conse-

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232, b. 246, b.

(d) See Ord. in Cha. 70, Ed. Bea.

⁽a) Ord in Ch. 70, Ed. Bea. (c) West. Symb. Cha. 195, a.; (b) 2 West. Sym. Chan. 195, a. Prac. Reg. 371, Wy. Ed.

quences, are now out of use (e), and the plaintiff is to be relieved according to the form of the bill, whatever new matters may have been introduced by the defendant's plea or answer (f). But if the plaintiff conceives, from any matter offered by the defendant's plea or answer, that his bill is not properly adapted to his case, he may obtain leave (g) to amend the bill (h), and suit it to his case, as he

- (e) Prac. Reg. 372, Wy. Ed. (1) Indeed if a plaintiff is disposed to controvert a part of a case made by the defendant's answer, and to admit the rest, he may still put in a replication so far special, that it is confined to the particular matter controverted, instead of being a general denial of the truth of the whole answer; and then the defendant is put only to proof of the matter replied to.
- (f) Prac. Reg. 372, Wy. Ed.
- (g) See 1 Ves. 448.
- (h) And this will be permitted after replication; and leave will be granted to the plaintiff to withdraw the replication and amend the bill (2). See Pott v. Reynolds, 3 Atk. 565; Pitt v. Watts, 16 Ves. 126; Cowdell v. Tatlock, 3 Ves. & B. 19; Lord Kilcourcy v. Ley, 4 Madd. 212.

A general replication to a plea and an answer in support of it, a d-mits the sufficiency of the plea as much as if it had been set down for argument and allowed; and if the facts relied on by the plea be proved, the bill will on hearing be dismissed, of course. If a replication be filed inadvertently the court will permit it to be withdrawn. Hughes v. Blake, 6 Wheat. 453, 5 Cond. Rep. 140, 136.

On replication no statement in the answer not responsive to the bill is available for defendant on hearing, unless established by proof. Wakeman v. Grover et al., 4 Paige's R. 33, 23. Affirmed, 11 Wend. R. 187.

To enable either party to take proofs on the question of usury, the answer should aver the transaction to be usurious. An allegation of defendant, that he is informed and believes it is tainted with usury, is not sufficient to render it necessary to file a replication to that answer. Suydam v. Bartle, 10 Paige R. 97, 94.

(2) [But it will not be permitted, unless the complainant shows the materiality of the amendments, and why the matter proposed as an amendment was not before stated in the bill. *Brown* v. *Rickets*, 2 J. C. R. 425.]

^{(1) [}Storms v. Storms, Edwards' V. C. Rep. 358. No special replication allowed to be filed in the court of chancery of the State of New-York without leave of the court on cause shown. 65th Rule.] So by rule in Massachusetts, 24 Pick. R. 413, and in U. S. Courts, Vattier v. Hinde, 7 Peters' R. 274, 252.

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shall be advised (i). To this amended bill the defendant may make such defence as he shall think proper, whether required by the plaintiff to answer it or not (k).

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According to the present course of the court, although rejoinders are disused, yet the plaintiff, after replication, must serve upon the defendant a subpæna requiring him to appear to rejoin, unless he will appear gratis (l) (3). The effect of this process is merely to put the cause completely at issue between the parties. For now, immediately after the defendant has appeared to rejoin gratis, or after the return of a subpæna to rejoin served on the defendant, and which by order obtained of course is now usually made returnable immediately, and served on the defendant's clerk in court,

(i) As to the extent to which this liberty may be carried, see 2 Sch. & Lefr. 9; Seeley v. Boehm, 2 Madd. R. 176; Mazzaredo v. Maitland, 3 Madd. 66 (1). As to the consequence of making an entirely new case by the amendment, see Mavor v. Dry, 2 Sim. & Stu. 113 (2). And as to the adding or striking out a prayer for relief, see Butterworth v. Bailey, 15 Ves. 358; Earl of Cholmondeley v. Lord Clinton, 2 Ves. & B. 113. But it may be observed that v. Macklew, 1 Sim. & Stu. 136, n. the plaintiff may not amend his bill after plea to part thereof has been v. Herbert, Dick, 349.

allowed, without leave of the court. Taylor v. Shaw, 2 Sim. & Stu. 12.

(k) The original bill is rendered nugatory by amendment, 3 Madd. 429; and if the alteration be so considerable as, according to the practice of the court, to make it necessary that a new ingrossment should be filed as of record, counsel's signature must be affixed thereto. Kirkley v. Burton, 5 Madd. 278; Webster v. Threlfall, 1 Sim. & Stu. 135; Pitt

(1) Anon. Mos. 123, 296; Flower

^{(1) [}Lyon v. Tallmadge, 1 J. C. R. 184; Livingston v. Gibbons, 4 ib. 94; Thorn v. Germond, ib. 363; Beekman v. Waters, 3 ib. 410; Shepherd v. Merrill, ib. 423; Renwick v. Wilson, 6 ib. 81.]

^{(2) [}Also Pratt v. Bacon, 10 Pickering's R. 123.]

⁽³⁾ By the 93d order of May, 1845, no subpæna to rejoin is to be issued, but upon the filing of the replication therein prescribed, the cause is to be completely at issue.

the parties may proceed to the examination of witnesses to support the facts alleged by the pleadings on each side (m). Where by mistake a replication has not been filed, and yet witnesses have been examined, the court has permitted the replication to be filed *nunc pro tunc* (n).

(m) Mosely, 296; Prac. Reg. 371, novo. See Rerks v. Wigan, 1 Ves. Wy. Ed. It may be noticed that & B. 221; Brickwood y. Miller, 1 leave will in some instances be given Meriy. 4. to withdraw a rejoinder and rejoin de (n) Rodney v. Hare, Mosely, 296.

CHAPTER THE FOURTH. [324]

OF INCIDENTS TO PLEADINGS IN GENERAL.

Amendment of bill before the hearing.

In the preceding chapters have been considered the nature of the pleadings used in the equitable jurisdiction of the court of chancery, and the manner in which they are brought to a termination. Before the proceedings arrive at that point the court will frequently permit the pleadings filed to be altered, as the purposes of parties may require (a) (1), except in the case of answers put in

above, p. 253; and of pleas, Dobson [Jackson v. Rowe, 4 Russ. 588.]

(a) As to the amendment of bills, v. Leadbeater, 13 Ves. 230; Merresee above, pp. 67, 383; of demurrers, wether v. Mellish, 13 Ves. 435; Glegg v. Legh, 4 Madd. 208; Thorpe Wood v. Strickland, 2 Ves. & B. v. Macaulay, 5 Madd. 218; and 150; Thompson v. Wild, 5 Madd. 82.

⁽¹⁾ The principle of the New-York Revised Statutes directing that mistakes of day, month and year in pleading or record, which could be amended by the court after verdict, shall be disregarded on trial, unless it surprise or mislead the adverse party, and prevent his preparation for a full answer on the merits and which it has been decided, applies to a mistake in setting out the deed or instrument which is the foundation of the suit, applies to a court of chancery, though it is not in terms extended to this court. Therefore, if the party could not have been misled by a mistake in the date, the bill should not be dismissed, or defence rejected by reason of a mere clerical mistake of this kind, where upon the face of the record, the variance will not render complainant's claim to relief, or defendant's defence bad in substance. It was so held on appeal from a vice-chancellor, from a decree of foreclosure, that if the party (appellant) apprehend danger of liability a

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upon oath, in which the court, for obvious reasons, will not easily suffer any change to be made (b).

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(b) A special application is necessary for the purpose, 4 Madd. 27, and the court will not as formerly, (see 3 Barn. 51; 2 Eq. Ca. Ab. 60; Wharton v. Wharton, 2 Atk. 294; Dagley v. Crump, Dick. 35; Bedford v. in the case of an infant defendant,

Wharton, Dick. 84; Patterson v. Slaughter, Ambl. 292; and cases cited, 1 Ves. & B. 150, note (a); 10 Ves. 285, 401); give leave to amend the answer itself (1), except

second time for the note or mortgage, he may have the original bill on file which is to constitute a part of the enrolled decree amended so as to conform to the true date, if it is not already right in this respect. And that would have been allowed by the vice-chancellor, as a matter of course at the hearing, if defendant or counsel had asked for it. It therefore forms no ground for reversal upon the appeal, for the answer shows that defendant could not have been misled by the clerical mistake in substituting, in this case, April for August. Ontario Bank v. Schermerhorn, 10 Paige's R. 111-112, 109.

Where a plaintiff amends his bill, after answer, in such a manner Amended bill inthat the case made or the relief asked by the bill is totally inconsistent the original bill with the case made or the relief asked by the original bill, the bill is demurrable: as where the original bill prays that a bond may be delivered up to be cancelled, on the ground of its having been satisfied, while the amended bill prays that an account may be taken of what is due upon the bond. Cresy v. Beavan, 13 Sim. 354.

(1) The practice of amending the answer of a defendant, which prevailed previously to the time of Lord Thurlow, has been discontinued in this country as well as in England. The modern practice is, on a proper case, to permit defendant to file a supplemental answer, thus giving complainant the benefit of the original answer with the explanations or denials in the supplemental answer. Where such permission is given after proofs, it is proper to allow the testimony taken to be used at hearing without re-examination to save facts; giving parties opportunity for further proof as to the new matters put in issue by the supplemental answer. A defendant who is allowed a supplemental answer to correct a mistake in his original—should pay the extra costs of adverse party consequent from his neglect to put in a proper answer. Where defendant by mistake or under misapprehension of his rights. or of the facts in the case makes an admission in his answer inconsistent with the truth, the court will permit him to file supplemental answer, correcting the mistake, to enable him to produce proofs to show that the fact is otherwise than so admitted by him. But the court will not permit such supplemental answer to be filed unless it is evident

[325] After the examination of witnesses no part of

Savage v. Carroll, 1 Ball & B. clerical error (1), (Griffiths v. Wood, 548,) and except in cases of mere 11 Ves. 62; Peacock v. Duke of

there has been a mistake in the original answer, and that the general justice and equity of the case require a supplemental answer. *Hughes* v. *Bloomer*, 9 Paige's R. 271, 269.

(1) Courts of equity are very indulgent in allowing amendments of answers in matters of form, mistake of dates, or verbal inaccuracies. But for amendments in material facts, or to change essentially the grounds taken in the original answer, the court are exceedingly reluctant, and require very cogent circumstances, and such as repel the notion of any attempt of the party to evade the justice of the case, or to set up new and ingeniously contrived defences or subterfuges. When the object is to introduce new facts wholly dependent on parol, the reluctance of the court is greatly increased, as it encourages carelessness, and leaves room for manufactured evidence. Not so where documents are omitted by mistake or accident. These cannot speak a different language. It rests in discretion, and the court may grant leave to file an amended answer when the purposes of substantial justice require it. But it should appear that the facts to be added are highly probable, material, that party has not been guilty of gross negligence, and that the mistakes and facts have been discovered since the original answer was sworn to. Smith v. Babcock, 3 Sumner's R. (Mass.) 585-6, 583.

Where new matters of defence are discovered after answer, but existed before, defendant should apply for leave to file a supplemental answer, instead of resorting to a cross bill only. Such matters, it seems, cannot be set up in the cross bill. Talmage v. Pell et al., 9 Paige's R. 412, 413, 410.

Supplemental answer to correct a mistake.

Leave will be given to file a supplemental answer to correct a plain mistake in the original answer. White v. Sayer, 5 Sim. 566.

And a supplemental answer will be allowed to be filed to state that a passage was hastily inserted by mistake in the answer after it was engrossed, where the application is supported by an affidavit as to the mistake, and not opposed by a counter affidavit. Swallow v. Day, 2 Coll. Ch. 133.

And leave will be given to file a supplemental answer, even after the cause is in the paper for hearing, in order to correct a date, where the defendant states that he was obliged to insert the date in the former answer from memory, and the correction will have the effect of creating a good defence to the bill. Fulton v. Gilmour or Gilmore, 8 Beav. 154; 1 Phil. 522. See also Bell v. Dunmore, 7 Beav. 283.

Leave will also be given to file a supplemental answer to correct a

the pleadings (c), can be altered or added to, but

Bedford, 1 Ves. & B. 186; White v. Godbold, 1 Madd. R. 269; Faircloth v. Webb, 5 Madd. 73, but see Ridley v. Obee, Wightw. 32,) but, upon its conscience being satisfied that the defendant ought not to be concluded by the answer as upon record, (10 Ves. 401; 4 Madd. 27; and see Tennant v. Wilsmore, 2 Anstr. 362,) if the matter already brought forward be ambiguously stated, and it appear that the defendant meant to swear to it in the sense which he seeks upon his application to put upon it, (Livesey v. Wilson, 1 Ves. & B. 149,) or if it be desired to introduce new matter (1), and it appear that the defendant, at the time of putting in the original answer, was not aware thereof, (Wells v. Wood, 10 Ves. 401,) it will permit a supplemental answer to be filed, (Jennings v. Merton Col- Wilsmore, Anstr. 362.

lege, 8 Ves. 79; 10 Ves. 285; 19 Ves. 584; Curling v. Marquis Townshend, 19 Ves. 628; Strange v. Collins, 2 Ves. & B. 163; Edwards v. M. Leay, 2 Ves. & B. 256; 4 Madd. 407,) as a mode by which justice may be more surely administered, 19 Ves-631.

(c) As to bills, see Wright v. Howard, 6 Madd. 106, and above, p. 67. Where no witness has been examined, an amendment has been permitted after publication passed. Hastings v. Gregory, in the Excheq 19th Nov. 1782; 1 Fowl. Excheq Pr. 127; Sanderson v. Thwaites, in Chan. Trin. 1782. With respect to answers, see Chute v. Lady Dacres, 2 Freem. 172; Mullins v. Simmonds, Bunb. 186; Kingscote v. Bainsby, Dick. 485; Tennant v.

mistake upon a particular point, where the defendant, in his answer, has spoken as to his belief only, with regard to the point, and where the application for leave is supported by an affidavit that he has since been more correctly informed. Frankland v. Overend, 9 Sim. 365.

And where a defendant by his answer pleads a modus for all tithes, and afterwards moves to file a supplemental answer stating that he had since discovered that the modus covered part only of the tithes, the court will order the cause to proceed as if the modus had been laid in the manner proposed. Podmore v. Skipwith, 2 Sim. 565.

But where a bill is filed against a solicitor for negligence in respect to a deed, and by his answer he admits that the firm to which he belonged were paid for drawing the deed, and that the bill of costs is in his possession; he will not be allowed to file a supplemental answer, denying those admissions, and stating that he had since discovered, on examining his books, that the deed was drawn by his deceased partner gratuitously. Greenwood v. Atkinson, 4 Sim. 54.

(1) Leave will be given to a defendant, before publication has passed, to file a supplemental answer to state information he has answer to intro received subsequently to the filing of his original answer. Farmer ter. v. Farmer, 6 Jur. 72, V. C. E.

duce new mat-

under very special circumstances (1), or in consequence of some subsequent event, except, that if the plaintiff at any time discovers that he has not made proper parties to his bill, he may obtain leave to amend his bill for the special purpose of adding the necessary parties (d) (2); and leave has also

(d) Anon. 2 Atk. 15; Goodwin v. Cur. Canc. 546; see above, pp. 67, Goodwin, 3 Atk. 370; 1 Prax. Alm. 383.

So leave will be given, after replication, to file a supplemental answer to a bill for dower, in order to state a fine and non-claim which have been omitted to be stated in the original answer, through, ignorance of the levying of the fine. Jackson v. Parish, 1 Sim. 505.

And where a plaintiff claims a share of an intestate's estate under the statute of distributions, and the defendant, after filing his answer, discovers that the intestate was domiciled in a foreign country, leave will be given to file a supplemental answer for the purpose of stating that fiat. *Tidswell* v. *Boyer*, 7 Sim. 64.

But after a decree nisi in a tithe suit, the defendant will not be allowed to file a supplemental answer, setting up a modus founded on evidence with which the defendant has subsequently become acquainted, even though the defendant offers to indemnify the plaintiff as to any extra costs occasioned by setting up a new defence; for, in such case, it is impossible to put the plaintiff in the same situation as he would have been in if this defence had been stated on the record in due time. M'Dougal v. Purrier, 4 Russ. 486.

(1) See supra, pp. 74 and 75, and notes.

Where at the time of amending his bill, a plaintiff has changed his residence, it should be stated by amendment; for the rule that subsequent facts are the proper subject of a supplemental bill, and not of amendment, does not apply to a mere change of residence. Kerr v. Gillespie, 7 Beav. 269.

By answering an amended bill a defendant does not preclude himself from the right of objecting at the hearing to matter originally introduced into the bill by amendment, where he takes the objection by his answer, and reserves to himself the same benefit of it as if he had pleaded it in bar. Milligan v. Mitchell, 1 My. & C. 433.

(2) An order to amend as the plaintiffs may be advised, does not authorize the striking out of the names of co-plaintiffs. Sloggett v. Collins, 13 Sim. 456. [But an amendment by adding a party complainant is not a matter of course. Lucton School v. Scarlet, 13-Price 51.]

been given to amend the prayer under particular circumstances (e). If any event happens which alters the interest of any party, or gives any new interest to any person not a party, the plaintiff may bill or bill of refile a supplemental bill, or bill of revivor, as the occasion may require. And if the plaintiff thinks some discovery from the defendant, which he has not obtained, is necessary to support his case, he may file a supplemental bill to obtain that discovery (f). He may also file a supplemental bill to put in issue any matter necessary to his case when he cannot obtain permission to alter his original bill by amendment (1); but he cannot upon such a supplemental bill examine witnesses to any matter in issue by the original bill (g).

If upon hearing the cause the plaintiff appears entitled to relief, but the case made by the bill is insufficient to ground a complete decree, the court will sometimes give the plaintiff leave to file a supplemental bill, to bring the necessary matter, in ad-

⁽e) Cook v. Martin, 2 Atk. 2; Atk. 371; Usborne v. Baker, 2 Madd. Harding v. Cox, 3 Atk. 583; Palk R. 379.

v. Lord Clinton, 12 Ves. Jun. 48. (g) Bagenal v. Bagenal, 6 Bro. (f) Boeve v. Skipworth, 2 Ch. P. C. 81, Toml. Ed.

Rep. 142; Goodwin v. Goodwin, 3

⁽¹⁾ See supra, p. 74 & 75, and notes. But where pending suit and after answer, and pending accounts before master, a release was given-and introduced in proof without exception, one party contending it was by duress, the other that it was voluntary; it was held that no cross-bill or supplemental answer was necessary to bring it before the court. There is no propriety in requiring technical and formal proceedings, when they tend to embarrass and delay the administration of justice; unless they are required by some fixed principles of equity, law or practice, which the court would not be at liberty to disregard. Kelsey & M'Intyre v. Hobby & Bond, 16 Peters, 277-8, 269.

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Amendment on hearing.

dition to the case made by the original bill, before the court (h). If the addition of parties only is wanted (i), an order is usually made for the cause to stand over, with liberty to amend the bill by adding the proper parties (1); and in some cases where a matter has not been put in issue by a bill with sufficient precision, the court has, upon hearing the cause, given the plaintiff liberty to amend the bill for the purpose of making the necessary alteration (k) (2).

Amendment in the case of an infant.

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The court considering infants as particularly under its protection will not permit an infant plaintiff to be injured by the manner in which his bill has been framed. Therefore, where a bill filed on behalf of an infant submitted to pay off a mortgage, and upon hearing the cause the court was of opinion that the infant was not bound to pay the mort-

(h) 3 Atk. 133.

(i) See above, pp. 67, 383.

of neglect to amend within a reasonable time, see Cox v. Allingham, 3

(k) Filkin v. Hill, 4 Bro. P. C. 640, Madd. 393. (3)

Toml. Ed. As to the practice in case

Amendment of bill by adding co-plaintiffs and new matter after the hearing.

- (1) Under an order made on the hearing, that the cause should stand over, and that the plaintiffs should be at liberty to amend their bill for the purpose of adding parties, as they might be advised, or of showing why they were unable to bring all proper parties before the court, the plaintiffs are not entitled to add parties as co-plaintiffs, and introduce new matter explaining the interests of such new co-plaintiffs; because the plaintiffs would thereby be substituting a new record; so that if the witnesses swore falsely, and their depositions were read, they could not be indicted for perjury, because they would be depositions in a cause of which the record no longer existed. Milligan v. Mitchell, 1 My. & Cr. 433.
- (2) [Where there is a clear mistake in an answer, which is proper to be corrected, the practice is to permit the defendant to file an additional or supplemental answer. But this is allowed with great caution; and only where there is a mistake, properly speaking, in a matter of fact. Bowen v. Cross, 4 J. C. R. 375.] See supra, pp. 385-7, notes.

(2) [Also Franklin v. Beamish, 1 Hogan 72.]

gage, it was ordered that the bill should be amended by striking out the submission (1). And where a matter has not been put by the bill properly in issue, to the prejudice of the infant, the court has generally ordered the bill to be amended (m).

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A like indulgence has been granted to a defen- Amendment of answers. dant when upon hearing a cause it has appeared that he has not put in issue by his answer facts which he ought to have put in issue, and which must necessarily be in issue to enable the court to determine the merits of the case, the defendant being permitted to amend his answer by stating those facts. This has formerly been done in the exchequer, where a modus has been set up as a defence to a bill for tithes; and it appeared from the evidence in the cause that there was probably a good ground for opposing the plaintiff's claim, though the defendant had mistaken it, and the court permitted him to amend his answer (n); but this has been refused in other cases. Where an answer has been prejudical to a defendant from a mere mistake, upon evidence of the mistake an amendment has been permitted (o). This indulgence has been extended, after much consideration, beyond mere mistake, where by the answer an important fact was imperfectly put in issue, and no witness had been examined, the cause being heard

⁽l) 1 P. Wms. 428. (1) Effingham, 3 P. Wms. 401, 403. Toml. Ed.; 2 Anstr. 443. And see Bennet v. Lee, 2 Atk. 529.

chequer, Easter, 1779. See also (m) See p. 38; Napier v. Lady Filkin v. Hill, 4 Bro. P. C. 640, (o) Countess of Gainsborough v.

⁽n) Phillips v. Gwynne, Ex-Gifford, 2 P. Wms. 424.

⁽³⁾ Franklin v. Beamish, supra.

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on bill and answer (p). In general, however, this indulgence is confined to mere mistake or surprise (q) (1). A distinction has also been made between the admission of a fact, and the admis-

cause came first before the Master of the Rolls, who made an order, giving liberty to the plaintiff to amend the bill, and to the defendant to amend the answer, to which the plaintiff penter, 2 P. Wms. 482. might reply and go to issue. On appeal to the Chancellor the order v. Lady Dacres, 2 Freem. 173.

(p) Powell v. Hill, in Chan. The was affirmed, 19th March, 1735, MS. n.; Countess of Gainsborough v. Gifford, (since reported 2 P. Wms. 424,) cited as determined on several precedents. But see Sorrell v. Car-

(q) 2 Bro. C. C. 619. See Chute

(1) {Amendments will not be granted to enable a party to set up the defence of usury or of the statute of limitations, if he has not availed himself of the opportunity to interpose such defence in the first instance. It seems, however, that where such defences are defectively set forth, an amendment will be allowed to give the party the benefit of the defence which he intended to present, but he will not be permitted to put in a new or additional plea or answer. Beach v. Fulton Bank on appeal, 3 Wendell's R. 573; S. C. 1 Paige's C. R. 429.] See pp. 385, 386, supra.

In matters of form or mistakes of dates, or verbal inaccuracies, courts of equity are very indulgent in allowing amendments of answers. But they are slow to allow amendments in material facts, or to change essentially the grounds taken in the original answer. The whole matter is in the discretion of the court; but before the amendments to the answer are allowed, the court should be satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected or the facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put in and sworn to. Wiggin v. Dorr, 3 Sumner's C. C. R. 410.

Where a party, by a slip, has lost the opportunity to set up a mere technical or unconscientious defence, and comes to the court for a favor, which it is necessary should be granted to enable him to set up such a defence, the court of chancery will require him to do equity, as a condition of granting the favor asked. Hartson v. Davenport, 2 Barb. Ch. Reps. 77.

sion of a consequence in law or in equity (r). Where a defendant after putting in an answer discovered a ground of defence to a bill of which he was not before informed, a purchase by the person under whom he claimed without notice of the plaintiff's title, which could only be used by way of defence, and could not be the ground of a bill of review, the court allowed the answer to be taken off the file, and the new matter to be added, and the answer re-sworn (s). Where a fact which may be of advantage to a defendant has happened subsequent to his answer, it cannot with propriety be put in issue by amending his answer. If this appears to the court on the hearing, the proper way seems to be to order the cause to stand over till a new bill in which the fact can be put in issue be brought to a hearing with the original suit (t); and a bill for this purpose seems to be in the nature of a plea puis darrein continuance at the common law (1).

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Sometimes, upon hearing of a cause, it has ap- Exhibiting inter peared that a matter properly in issue, or at least filing a replicastated in the proceedings, has not been proved against parties who have admitted it by their answers, although not competent so to do for the purpose of enabling the court to pronounce a decree. In these cases the court has permitted the proper steps to be taken to obtain the necessary

rogatories,

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⁽r) See Pearce v. Grove, 3 Atk. and filing a supplemental answer 522; and S. C. Ambl. 65, but very instead of amending and reswearing differently stated.

⁽⁸⁾ Patterson v. Slaughter, Ambl. 386, note (b). 292. As to amending an answer,

the original answer, see above, p

⁽t) Hayne v. Hayne, 3 Ch. Rep. 19.

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proof; and for this purpose has suffered interrogatories to be exhibited (u); and where the plaintiff has neglected to file a necessary replication, has allowed him to supply the defect (x). Thus, where a bill was filed on behalf of creditors, for satisfaction out of real and personal estates devised to trustees for that purpose, and, subject to that charge, in strict settlement, and the answers of the tenant for life, and of the first remainder-man in tail, who was an infant, were not replied to, the court, on hearing, directed that the plaintiff should be at liberty to reply to those answers, and exhibit interrogatories, and prove their debts against those defendants, as they had before proved them against the trustees; and reserved the consideration of the directions necessary to be given upon such new proof (y).

Relation of matters introduced by amendment.

In most of these cases the indulgence given by the court is allowed to the mistakes of parties, and with a view to save expense. But when injury may arise to others the indulgence has been more rarely granted; and so far as the pendency of a suit can affect either the parties to it, or strangers, matter brought into a bill by amendment will not have relation to the time of filing the original bill, but the suit will so far be considered as pendent only from the time of the amendment (z), except that where a bill seeks a discovery from a defendant, and having obtained that discovery, the bill is

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⁽u) See 2 P. Wms. 463; and see 3 P. Wms. 289; Smith v. Althus, 11 Ves. 564; Willan v. Willan, 19 Ves. 590; S. C. Coop. R. 291; Swinford v. Horne, 5 Madd. 379; Moons v.

De Bernales, 1 Russ. R. 301; Abrams v. Winshup, 1 Russ. R. 526.

⁽x) See above, p. 384.

⁽y) Lambert v. Ashcroft, at the Rolls, 18th Feb. 1779.

⁽z) 2 Atk. 218.

amended by stating the result, it should seem that the suit may, according to circumstances, be considered as pendent from the filing of the original bill at least as to that defendant, and perhaps to the other parties, if any, and to strangers also, so far as the original bill may have stated matter which might include in general terms the subject of the amendment.

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Though in general with respect to the original General rule as parties, and their interests, no amendment will be permitted after the cause is at issue, and witnesses have been examined, and publication passed (y); vet a plaintiff has been permitted under such circumstances, to amend his bill by adding a prayer Exceptions. omitted by mistake (z) (1). Even upon the hearing, as already noticed (a), the court having the whole case before it, and being embarrassed in its decision by defects in the pleadings, has permitted amendments both of bills (b) and answers (c), un-

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(y) Anon. Barn. 222; 2 Anstr. 362. And see above, pp. 386, 387, and note. It may be observed, that in such a case the plaintiff must generally apply to the court for liberty to withdraw his replication, as well as to amend his bill. 1 Atk. 51; Motteux v. Mackreth, 1 Ves. Jun. 142; 1 Turn. R. 24; see above, cases cited, p. 67, note; and p. 383, notes (i) and (k).

- (z) Harding v. Cox, 3 Atk. 583.
- (a) Pp. 389-391. And here it may

be remarked, that an amendment of the bill will be permitted after a demurrer or a plea has been filed, but generally not after it has been set down to be argued. Anon. Mos. 301; Vernon v. Cue, Dick. 358; 1 Ves. Jun. 448; Carleton v. L'Estrange, 1 Turn. R. 23.

- (b) See above pp. 67, 389, 390.
- (c) See Countess of Gainsborough v. Gifford, 2 P. Wms. 424; 1 Cox R. 159. See above, p. 390. (2)

⁽¹⁾ The court may, for the purpose of avoiding unnecessary delays, entertain a motion to amend a bill in equity, at the same time that exceptions thereto are filed, and may require the defendants to answer the amended matter and the exceptions together. Kettridge v. The Claremont Bank, 3 Story's C. C. Reps. 59.

⁽²⁾ When a fact occurs during the pendency of a suit in chancery,

ture, to supply a defect.

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Supplemental or cross-bill, or bill der very special circumstances. Where new mat-of review, or bill of that nater has been discovered by either plaintiff or defendant before a decree has been pronounced deciding on the rights of the parties, a supplemental or cross-bill has been permitted, to bring such matter before the court to answer the purposes of justice, instead of allowing an amendment of a bill or answer, where the nature of the matter discovered would admit of its being so brought before the court; and after a decree, upon a similar discovery, a bill of review, or a bill in nature of a bill of review, has been allowed for the same purpose, both those forms of proceeding being in their nature similar to amendments of bills or answers, calculated for the same purposes, and generally admitted under similar restrictions (1). It may however happen that by the mistake, or negligence, or ignorance of parties, their rights may be so preju-

Refusal to permit new matter to be put in is-

> which it is deemed material to have considered in deciding the case, leave must be obtained by the complainant, if it be on his part, to withdraw his traverse, and amend his bill, or file a supplemental bill; or by the defendant, if on his part, to file a cross bill, in order to bring the new matter within the issue, that testimony may be taken on both sides if desired. Blaisdell v. Stevens et al., 16 Vermont Rep. 186.

> A complainant will not be allowed to amend his bill so as to make a new case, after the proofs in the cause have been taken and closed Dodd v. Astor, 2 Barb. Ch. R. 395.

> Where no occurrence has taken place to change the rights of the parties subsequent to the commencement of the suit, the complainant cannot, after the cause is at issue, file a supplemental bill for the mere purpose of putting in issue new matters which might have been introduced into the original bill by way of amendment, although the new facts were not known to the complainant until after the cause was at issue on the original bill. The proper course for the complainant, where the proofs have not yet been taken, is to apply for leave to withdraw his replication and amend. Dias v. Merle, 4 Paige's Ch. R. 259.

(1) See supra, pp. 99, n., 75, n., 389, n.

diced by their pleadings that the court cannot permit important matter to be put in issue by any new proceeding without so much hazard of inconvenience, that it may be better that the individual should suffer an injury than that the administration of justice should be endangered by allowing such proceeding.



NOTE ON PARTIES,*

COMPRISING THE DECISIONS FROM THE BEGINNING OF THE YEAR 1826.

The decisions on the subject of Parties which have been reported from the beginning of the year 1826 down to the present time are very numerous. The editor conceives that he shall most consult the convenience of the profession, by arranging them into classes and subdivisions under the following titles!:—

- I. OF PARTIES generally.
- II. OF PARTIES out of the Jurisdiction.
- III. OF Misjoinder of Parties as Co-plaintiffs.
- IV. OF PARTIES TO SUITS OF A Public NATURE.
- V. OF PARTIES TO SUITS FOR AN Account AND TO Administration SUITS.
- VI. OF PARTIES TO SUITS PERTAINING TO THE RELATION OF Assignor and Assignee.
- VII. OF PARTIES TO SUITS AFFECTING PERSONS HAVING A Community of Interest.
- VIII. OF PARTIES TO Copyright Suits.
 - IX. OF PARTIES TO SUITS PERTAINING TO THE RELATION OF Debtor and Creditor.
 - X. Of Parties to Suits in respect of Actual or Constructive Fraud.
 - XI. OF PARTIES TO SUITS PERTAINING TO THE RELATION OF Husband and Wife.
- XII. OF PARTIES TO SUITS FOR Legacies.
- XIII. OF PARTIES TO SUITS PERTAINING TO THE RELATION OF Mortgagor and Mortgagee.
- XIV. OF PARTIES TO Partnership Suits.

^{*} The text on Parties occurs supra, pp. 190—208, and 325—327. (See also Calvert on Parties in Equity; Edwards on do.; Story's Eq. Pl. C. IV.

[†] The titles, after the first four, are arranged in the alphabetical order of the leading words therein.

XV. OF PARTIES TO SUITS BY OR AGAINST Tenants in Common of Real or Personal Estate.

XVI. OF PARTIES TO Tithe SUITS.

XVII. OF PARTIES TO SUITS PERTAINING TO THE RELATION OF Trustee and Cestui Que Trust.

XVIII. OF PARTIES TO SUITS BETWEEN Vendor and Purchaser.

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I. Parties,
GENERALLY.

I. Parties, generally*(1).

- "A bill may be demurred to for want of parties, if any part of the relief prayed is such that it cannot be granted in the absence of a person who is not made a part to the bill." Ledbetter v. Long, 4 My. & C. 286.
- * As to making a decree, saving the rights of absent parties, see the 49th order of August, 1841, and practice cases thereon stated in Miller's Orders, p. 159.

(1) General rule. It has been found difficult, and it may be impracticable, to adopt one concise general rule comprehending every case. Perhaps the nearest approach to it, might be this: Those nominally, in law interested in the subject and object of the suit, may, those materially, should, and those essential to a decree, must, be made parties.

Though the first class, may, they ought not when the real parties in interest can be brought before the court; those who should, need not, when they cannot from absence, number or other inconvenience, be brought in, and a decree can be made without them; but those, without whom no decree can be made as between the parties before the court, are indespensable.

1. Those who may. The multiplication of parties having no interest at stake, should be avoided as tending to expense and embarrassment. There may be proper but not necessary parties,—such as assignor absolute of a judgment, (Bruen v. Crane et al. 1 Green's C. R. 348 347;) mortgagor who has parted with his equity of redemption, or all interest in the land, (Vreeland v. Loubat. Idem, 104, 348. Chester v. King. Id. 405). But legatees who have assigned their interest, need not and ought not to be made parties to bill by assignee for the legacies; their whole interest having vested by the assignment. The ground for making assignor of a common law right or chose in action party, is that he has a distinct right that cannot be assigned and cannot be extinguished but by a decree. But where the reason does not apply, the rule ceases. (King v. Berry's Executors, 2 Green's C. R., N. J., 51—54, 44.)

In New-York the suit is brought in name of real parties in interest,

Where a suit is instituted to set aside a decree in a prior General admin-

as the assignee of a chose in action is not permitted to file a bill in the name of a mere nominal party. (Rogers et al. v. The Tradesmen's Ins. Co. et al., 6 Paige's R. 598, 583; Field v. Maghee, 5 Paige's R. 539.) The real persons in interest must be parties, except in certain cases where complainant represents the rights of those for whom the suit is brought both legally and equitably, as executors, trustees, or assignees under insolvent acts; and where complainant after suit brought assigns his interest under the insolvent laws, the suit abates or becomes so defective that the suit cannot proceed against defendant if he object; or if complainant has so assigned his property and obtained a discharge under the act, the assignee must be party before the suit can proceed. If defendant's interest in the subject of the suit becomes vested in others pendente lite, without an actual abatement of the suit, complainant is not bound to, but may, make the assignee a party. For the assignee being a mere voluntary purchaser pendente lite, cannot defeat or delay complainant; if he could the suit by successive assignments would be interminable. But where the assignment is by operation of laws as under the bankrupt or insolvent laws, he has a right to be heard and must be made a party. (See further Sedgwick v. Cleveland, 7 Paige's R. 289, 290-1, 287, and Mills v. Hoag, Idem, 21, 20, 18.)

No one n ed be (1 Gall. 382-3,) nor, in general, should be, (2 Green's C. R. 122-3, 120,) a party against whom if brought to a hearing, no decree can be had. This, it has been said, is a general rule operating as an exception to the general rule that all interested should be parties. Therefore on a bill by creditors or purchasers against the assignee of a bankrupt, it seems now settled that the bankrupt himself need not be made a party, though it was formerly otherwise. Therefore when bill is brought to charge executors of deceased partner having assets with a joint debt which, at law, survived against surviving partners who were certificated insolvents, these need not be made parties. In cases where suit is against executors on other grounds, it seems clear that the rule that all surviving co-obligors should be parties, in general, prevails. Shall it be permitted to prevail where no relief can be given against the co-obligors? Shall a certificated bankrupt, who is a surviving partner, be joined with the executors, although no remedy can be effectually had in the suit against him? No case is discovered (say the court) where relief has been sought against the representatives of a deceased partner on the ground of bankruptcy of the surviving partner, that the bankrupt himself or his assignees have been made parties. The bill, if the reports are to be relied on, has been uniformly against the representatives alone. (Reimsdyk v. Kane et al. 1 Gallison's R. 383-4, 371.) So, on bill for surplus or residuum after payment of debts, legacies and prior incumbrances, those claimants

cree in a prior

to set aside a de- suit, a person who took a benefit under such prior suit is not

need not be parties; but all interested even remotely in the residuum, must. (Vanderpool v. Devenport's Ex'r, 2 Green's C. R. 122-3, 120.) 2. Those who should. The rule as stated and illustrated in King v. Berry's Ex'rs, 2 Green's C. R. 52, 53, 44, is, that all persons legally or beneficially interested in the subject matter and result of a suit must be parties. And in other cases, the rule is stated that all materially interested, must be parties; (Caldwell v. Taggart et al., 4 Peters, 190; The Mechanics' Bank of Alexandria v. Seton, 1 Id. 306;) and until brought in, no final decree, (Marshall v. Beverley, 5 Wheat. 313, 4 Cond. R. 660;) nor interlocutory which in great measure decides the merits, can pass. (Conn v. Penn, 5 Wheat. 424; 4 Cond. R. 716.) In Williams v. Russell, 19 Pick. R. (Mass.) 165, 162, the court say, the rule as well settled is, that all persons interested in the subject matter of a suit are to be made parties, but to this rule, as Lord Redesdale observes, there are many exceptions. In Wiser v. Blackly, 1 Johns. C. R. 438, Chancellor Kent observed; "the general rule is, you must have before the court all whose interests the decree may touch because they are concerned to resist the demand and to prevent the fund from being exhausted by collusion." This is sustained by English authority and accords with the rule of Calvert on Parties in Equity, 11: "All persons having an interest in the object of the suit ought to be made parties." (Smith v. The Trenton Delaware Falls Co., 3 Green's C. R. 508, 505;) another rule is that no person is necessarily to be made a party unless his interest may be affected by the decree. To reconcile the rules we must construe the first, as extending only to persons interested in the event of the suit, and not to persons interested only in the question involved in the issue. There is, however, another rule, that where a defendant is interested in having another made a party defendant, the plaintiff is obliged to make him a party, so that the principal defendant, may have his assistance in the defence. This rule is an exception to the second rule mentioned, and must be understood with this limitation, that a defendant is not entitled to the assistance of a mere witness, for if one be made a party against whom the plaintiff can have no decree, but who may be examined as a witness, the defendant may demur. A party to entitle himself to the assistance of a third party within the meaning of the rule, must make it appear that he has a right to claim through or rely on the equitable title of the third party. (Ibid., 19 Pick. R. 165, 162.)

The general rule therefore is, that all are necessary parties having an interest in the subject matter which may be affected by the decree. The rule is founded in the great principle of preventing future litigation and taking away multiplicity of suits by adjudicating upon the rights of all such parties upon whom a decree may or ought to

sufficiently represented by an administrator limited to the pur- I. PARTIES GENposes of the subsequent suit. Davis v. Chanter, 14 Sim. 212.



operate. (See Hodges v. Saunders, 17 Pick. R. 473, 470; Vanderpool v. Davenport's Ex'rs, 2 Green's C. R. 122-3, 120; Dehart v. Dehart, Idem. 472-3, 471; Mandeville v. Riggs, 2 Peters, 487-8, 482.) Hence, all interested, in the residuum, as former observed. (Vanderpool v. Davenport's Ex'rs, supra,) as where a residuary legatee sues for settlement and distribution, all the residuary legatees or their representatives must be parties. It grows out of the great principle above stated, a principle of great convenience in the administration of justice, still as applicable to general cases it is not inflexible. It may be dispensed where impracticable or very inconvenient to enforce it. But when complainant seeks a final settlement and distribution of the estate, it is important that one investigation should conclude all who have an interest, and as those not parties are not bound by the decree, there should be no dispensation of the rule except for necessary cause. Hence though one of the residuary legatees died insolvent, and no administration taken, yet the court held there was no necessity of dispensing the rule. (Dehart v. Dehart, supra.) So, all liable to contribution should when practicable be brought in, so as their equities and the rights of plaintiff may be adjusted. There are exceptions, it is true, to the rule, but they are founded in special considerations; as where a decree of contribution would be useless or the proceeding defeat the jurisdiction of the court, and the parties are not indispensable to a decree, or where the convenient administration of justice forbids it in the particular case. (Mandeville v. Riggs, supra.) But according to the general rule, that all interested in the subject matter of a suit in equity, whether directly and immediately, or incidentally and remotely, are to be made parties so that complete justice may be done between all parties interested in one suit. (Crease et al. v. Babcock et al., 10 Metcalf's R. (Mass.) 531-2.) Where there is a joint or joint and general contract, each of the debtors must be brought before the court. The reasons assigned are that the debtors are entitled to the assistance of each other in taking the account and to mutual contribution upon excess of payment beyond their respective shares. But where the reasons cease, the rule ceases, and therefore if the demand be admitted, and there can be no effectual contribution from the other parties, it is not allowed to prevail; and in cases of joint and several contracts, the rule itself has not stood without contradiction. The rule has been relaxed where the parties before the court were the only solvent persons and admitted the debt; where the absent party was beyond the process of the court, and where he stood in the situation of a mere surety, though it might be otherwise if he were a co-surety. (Reimsdyk v. Kane, 1 Gall. R.

the representa-

cutor against the

of another executor.

I. PARTIES GEN-A residuary legatee is a necessary party to a suit by the personal representative of the surviving executor of a testator, instituted for the purpose of recovering a part of the assets alleged to have been possessed by the executor who died first. Adams v. Barry, 2 Coll. 285.

> 383-4, 371.), But the rule that all in interest must be before the court is rather a rule of convenience, and will not be followed when the legal right is so entirely technical and unimportant as to warrant the court in passing it by where its observance would be attended with great inconvenience and answer no single beneficial purpose. Hence, a mortgagor who has assigned his interest, but not under seal, and retains the legal interest, need not be a party to bill of foreclosure by assignee. But assignor of judgments and bonds must be parties, they having a legal right which no assignment can transfer. Where choses in action are strictly of legal character the propriety of the rule is obvious; but even in such cases is not strictly enforced where the legal right is so entirely technical and unimportant as above mentioned. Packer v. Stevens, 2 Green's C. R. 58, 59, 56. But see in New-York cases quoted under the first branch of the rule, supra.)

> There is a current of authority adopting more or less a general principle of exception, by which the rule that all interested must be parties, vields when justice requires it in the instance of either of plaintiffs or defendants. (Stevenson et al. and Perit et al. v. Austin et al. 3 Metcalf's R. 474, 480 et seq.) The rule is subject to the discretion of the court. It was made and may be modified to promote justice. (Elmendorff v. Taylor, 10 Wheat. 152.) The rule though general is not universal, but has its exceptions in cases of creditors, or legatees of personal estate, whose interest is supposed to be defended by the personal representative, or where parties are so numerous as would cause great inconvenience, in bringing them in, or where one files a bill on behalf of himself and others. In applying the general rule, if one of several joint mortgagees dies, his representatives being interested in the object of the suit, must be parties. The right to sue or defend does not rest alone in the surviving obligee. (Smith v. The Trenton and Delaware Falls Co., 3 Green's C. R. 508, 505.) The rule is not universally applicable to cases in the courts of the United States. (See Elmendorff v. Taylor, supra, Russell v. Clarke's Ex'rs, 7 Cranch, 69-97, and Vattier v. Hinde, 7 Peters, 263-4, 252, ante p. 34 n.) Hence, the Circuit Court of United States will dispense with the joinder of a non-citizen, if without prejudice to his rights the court can decide the merits as between those present. (Ibid, and Harrison v. Urann, 1 Story's R. 66,

The rule is modified or partially dispensed as justice and the exi-

A tenant for life cannot sustain a suit for a commission to I. PARTIES GENascertain boundaries, without making the remaindermen parties to the suit; for in such case all who are interested in the Remaindermen, in a suit to asproperty must be before the court. Ragley v. Eest, 1 Russ. certain boundaries. & My. 659.

gency of the case requires. As where they are numerous and great delay and expense would result from attempting to make all parties, and the court can decide between those before them. Thus where 100 partners each executed a mortgage to secure the partnership debts a foreclosure of each without making the others parties was allowed. It is a proceeding in rem upon a separate mortgage made on a separate liability. (Boisgerard et al. v. Wall, 1 Smedes and Marshalls, Miss. C. R., 426-7, 404. So where the creditors of an insolvent were numerous, some residing out of the commonwealth, and residence of others unknown, it was held sufficient to make parties to bill concerning the assets, the assignees of the insolvent who had assigned his property for the payments of debts, the assignees alone having a right to claim the property, having the legal title, and who represent the interests of all the creditors interested. Stevenson et al. and Perit et al. v. Austin et al., 3 Metcalf R. 474, 480, et seq. In this case the assignees and assignor were in de parties defendant by certain claimants of an equitable fund assigned, and it was held sufficient. Ibid.) So, a few creditors of a deceased debtor may sue his representatives for account of assets and payment of the demands of the creditors. So where numerous persons have a common interest in a particular fund, one or more may sue for the benefit of the whole, for the purpose of obtaining a distribution of the fund. In such cases all the persons interested may come in and prove their claims before the Master, and entitle themselves to share in the benefit of the decree. Indeed these are really and substantially, though not nominally parties. Crease et al. v. Babcock et al., 10 Metcalf Rep. Mass. 531-2. This doctrine was fully considered and the reason of the rule regarded as peculiarly applicable to that case. It was there held that under the Revised Statutes of Mass. which makes stockholders of a bank liable in their individual capacities in proportion to the stock they may respectively hold at the dissolution of the charter, that the bill-holders cannot severally maintain a bill in equity against the stockholders to compel payment and redemption of the unpaid bills held by them respectively, but that all of them must join in one bill, or one or more of them file a bill for the benefit of all against all the stockholders. Ibid. All who are entitled to claim must sue as plaintiffs, or be allowed to com in and prove their claims before the master on a suit brought by some for the benefit of themselves and others; because, though their claims are several the fund liable for I. PARTIES GEN-

Where a suit is instituted for the sale of real property, in Executory devise, in a suit vise, the inheritance is not sufficiently represented by the perforasale. son who has such defeasible estate, but the persons claiming under the executory devise must also be parties. Goodess v. Williams, 2 Y. & C. Ch. C. 595.

> them is limited and may be insufficient to pay the whole; and then they must divide the fund in proportion to the amount of their respective claims as holders of bills, having an equal and common right to the fund. And so in like manner the court thought, all who are liable must be made defendants, for although they are severally liable and in different proportions it is a liability to contribute to a common fund for the payment of certain claims of the plaintiffs, and if the whole amount for which all the stockholders are liable is not required to satisfy the full claims of the bill-holders, the defendants will be liable to contribute to the common fund such proportion of the amounts for which they may be held liable as will be sufficient to satisfy the claims of bill-holders as actually established by the result of the suit. In no other way can the just proportion be established which the plaintiffs are respectively to recover if the fund is insufficient to satisfy them, or the proportion which the defendants are to contribute, in case the fund is more than sufficient to satisfy the claims upon it. Crease et al. v. Babcock et al., 10 Metcalf R. 532, et seq. 525-recognised and re-affirmed in Grew v. Breed et al., Id. 575, 569.

> See further exceptions to the general rule, 1 Cond. R. 507 n. and the case of West v. Randall et al. 2 Mason R. 181, in which the exceptions are stated: as where a person is without the jurisdiction, or personal representative is necessary, but right of representation in dispute where discovery of necessary parties is sought, the court will if possible decree between the parties before it; or where parties are numerous, the question is of general interest, and a few may sue for the whole; or the parties form part of a voluntary association, and may be fairly supposed to represent the rights and interests of the whole. Here if the bill purports for plaintiffs and all others interested, the plea for want of parties will be repelled. But the court will permit the others to come in. In this class are suits by part of a crew of a privateer against prize agents for account and proportion of prize. The bill, if for themselves and in behalf of all the rest of the crew, will be sustained. (Ibid.)

> Under the operation of the general rule, the real persons in interest should be the parties. (See under the first branch of the general rule as defined, supra.) So the parties should be interested; hence a mere witness is not a proper party. But making officers and agents of a corporation parties defendants is an exception to the general rule, that a

The court will not declare a power of appointment well I. PARTIES GEN. executed in the absence of the party interested in default of appointment. Grace v. Torrington, 1 Coll. Ch. C. 3.

mere witness, having no personal interest in the subject of the suit, cannot be made a party. But it is the settled law in this country and England, that in a bill against a corporation for relief, its officers and agents who are cognizant of the facts to which it relates, may be made defendants for the purpose of obtaining an answer on oath, which cannot be obtained in any other way; but where the whole relief claimed is against others, and not the corporation, and their officers are made parties, for instance, to ascertain when certain stocks had been transferred by that corporation, here, being merely witnesses, they do not come within the exception to the general rule. But in cases that come within such exception, the bill need not aver that the discovery sought is confined to such as are so made parties. It is sufficient if it appear the facts charged are material to the relief sought against the corporation, and are known to the officer or agent, especially where the discovery relates to transactions with such officer or agent. (Many v. The Beekman Iron Co. et al., 9 Paige's R. 193-4, 188.)

All interested should be parties, but all as we have seen, are not indispensable, where a decree on merits can be made as between those before the court. It is not essential, as at law, that parties litigant should be on opposite sides. A decree may be made, as between codefendants where they set up conflicting rights. (Piatt v. Oliver and Williams, 3 McLean's R. 31-2, 27.

4. Those who must be made parties. All who should, must be, as we have above seen, if they conveniently can be, and justice does not require a dispensation of them as parties. For although if a decree on the merits can be made as between those present, it will be where others are out of reach of process, numerous, or within the peculiar circumstances qualifying the general rule, yet otherwise they must be brought in, for then the principle of ending litigation demands it. A fortiori, if no decree can be made without them, they must be made parties. The proper course where there is a want of necessary parties, is to order the cause to stand over to enable complainant to bring the necessary parties before the court; or the bill should be dismissed without prejudice, and that his right to bring a new suit, making all proper persons parties, will not be barred by the decree. (Miller v. McCan, 7 Paige R. 457, 451; Van Epps v. Van Deusen, 4 Paige, 64.)

A bill may be dismissed if plaintiff when called on to make proper parties refuses or unreasonably delays: but it must be on demurrer, plea or answer pointing out the persons whom defendant insists ought to be parties. (Greenleaf v. Queen, 1 Peters, 149.)

To remove impediments or prevent failure in the ordinary adminis-

I. PARTIES GEN-ERALLY.

Tenant by the courtesy.

To a bill claiming an estate, an alleged tenant by the courtesy is a necessary party. Parker v. Carter, 4 Hare, 406.

tration of justice in favor of the constitutional right of redress of those within its jurisdiction, legislatures of some of our States, have authorized, in cases of absentees or unknown owners, who are indispensable or necessary parties, publication of an order for them to appear, and on default allowed the bill to be taken as confessed against them, and a decree to pass under certain safeguards for the protection of their rights and interests. In England without similar legislation, such absentees as are known are named as parties in the bill, and may come in; absence is charged in the bill, and the court proceeds against them, and disposes the property if it is in the power of the other parties. (See p. 34 n. and authorities.) In New-York, besides such publication as in ordinary cases, in case of absence, the bill in partition must state the rights and interests of all parties in the premises, so far as known to complainant and if not fully known, then according to his information and belief. And if the share or interest of any party is uncertain or contingent, or if the ownership of the inheritance depends upon an executory devise, or the remainder is contingent, so that the parties who may be ultimately entitled to the same cannot be named: the complainant should set forth the nature of such contingent interest, so that the court may ascertain and protect the rights of such unknown or contingent owners. And whatever complainant is bound to state in his bill, the defendants may be required to admit or deny by their answers. (See further, Van Cortland v. Beekman et al., 6 Paige R. 495-6, 492.)

In Ohio, partition proceedings are considered as analogous to those in rem, and the publication of notice by advertisement as required by statute, is sufficient to apprize and to bind defendant's interest. (Pillsbury et al. v. Dugan et al., 9 Ohio R. 117, 120.

Our judiciary has struggled to bend the rule of parties to a principle of justice, which, as above mentioned, has grown into a principle of exception to the rigid exception of the rule, according to Griswold v. Jackson, 2 Edw. C. R. 461; affirmed in error, 4 Hill's R. 522, there are many cases where a person, though not a nominal party, is concluded by the decree, because he has in fact taken the management of the cause, or when he has notice of its pending and a chance to litigate but neglects to do so. As where party holds the mere equitable interest—an assignee or cestui que trust, or where he is a guarantor or indemnitor of the party against the consequences of the suit. Id. 530, et seq. But a mere surety is not bound by decree between his principal and the creditor, though the suit was conducted exclusively by the surety as agent of the principal. Secus, if surety voluntarily came in, and litigated as such in the name of his principal, with assent of the creditor. Id. 522.

Where the object of a bill is to restrain proceedings against I. Parties GENthe sheriff, it is not improper to make him a party. Farquharson v. Pitcher, 2 Russ. 81.

If a person who is not a party to an action is made a party to a bill of discovery in aid of the defence to the action, he may demur, although the bill shows that he may have a bene-the defence to which a bill of fit from the action. Irving v. Thompson, 9 Sim. 17; Kerr v discoveryis filed. Rew, decided by the L. C. 10 Sim. 370.

Where a bill is filed by a landlord to restrain an ejectment, the to restrain an tenant must be made a party, unless the landlord has been adejectment. mitted to defend the action. Pool v. Marsh, 8 Sim. 528.

If there are two plaintiffs in an action of ejectment, it is netitiffs in ejectcessary or proper that both of them be plaintiffs to a bill to pretint the plaintiffs in a bill to pretion. vent the setting up of outstanding terms; because, if one of vent the setting up of a term. them is made a defendant, the power of the court over the action is thereby abridged. Baker v. Harwood, 7 Sim. 373.

Sheriff, in a suit to restrain pro-ceedings against him.

Person not a par-ty to an action to

II. Parties out of the Jurisdiction (1).

It is not enough to state that persons, who in respect of in-

II. PARTIES OUT Junis-THE DICTION

The general rule, however, requires the actual or constructive presence of all interested, as the condition of a decree affecting their interests, as stated in note, p. 34, supra. The principle applies to all courts of equity, that no court can, without such presence, adjudicate directly upon a person's right. (See case of Mallow v. Hinde, 12 Wheat. 193, in note, p. 34.) The principle is founded on natural justice, and is fortified directly or in analogy by declarations of rights and constitutional guarantees. No man can be condemned unheard, nor deprived of life, liberty, or property, without due process of law. Even the right of eminent domain cannot be enforced without such process and just compensation.

(1) See notes to pp. 398, 34.

In partnership cases where bill is filed for recovery of a debt out of deceased partner's estate, the surviving partner's are necessary and proper parties, for they have an interest in taking the accounts-Vose v. Philbrook, 3 Story R. 346-7. But if the other partners are out of the jurisdiction, it is in the sound discretion of the court to dispense or to insist on their being parties, so as to prevent injustice to the absent partners. Ibid.

The court (Circuit Court of the United States,) must have jurisdiction between each of the plaintiffs and defendants, and if one of the defendants do not live in the state where the suit is brought, the com-

DICTION General rule.

II. PARTIES OUT terest are necessary parties, are out of the jurisdiction: the bill must go on to pray process against them when they shall come within the jurisdiction. The reason for this is, that they may have an opportunity of appearing and of taking what. course they may deem most for their advantage. Munoz v. De Tastet, 1 Beav. 109, note. Brooks v. Burt, 1 Beav. 106.

Personal representative.

Where a bill is filed for the general administration of a testator's estate, it is necessary to have a personal representative of the testator before the court; that is, one who is not only made a party to the bill, but is also within the jurisdiction of the court; and, therefore, where the executor is out of the jurisdiction, administration must be taken out for the purpose of the suit, although the person-who so takes out administration is a mere nominee of the plaintiff. Lowry v. Fulton, 9 Sim. 104.

Cestuis que trust.

Where a trust fund is to be administered under the direction of the court, the general rule requiring the cestuis que trust to be parties is applicable to foreign trustees and cestuis que trust residing out of the jurisdiction, unless a special case of difficulty or inconvenience in the application of the rule be shown Weatherby v. St. Giorgio, 2 Hare, 624.

III. MISJOINDER OF PARTIES AS CO-PLAINTIFFS.

III. MISJOINDER OF PARTIES AS CO-PLAINTIFFS (1).

If co-plaintiffs actually have or may have conflicting interests

plainants being citizens of another state, such defendant may, by voluntary answer, disclaim any interest, and the bill as to him may be dismissed. Where the reason for not making a party is want of jurisdiction, the court will retain the case and decree as between parties before them, if they can do so without affecting the interests of those who are without the jurisdiction. The bill should state the citizenship of those in another state, and therefore not within the jurisdiction as a reason for not making them parties, and the court will decree as above. Hinde et al. v. Vattier et al. 1 McLean's R. 114, 115, 110; Vattier v. Hinde, 7 Peters 263-4, 252; see also Russell v. Clark's Executors, 7 Cranch's R. 69-97; 2 Cond. R. 426-7. Harrison v. Urann, 1 Story's R. 66, 64.

(1) Where two of the complainants wholly failed to show any right to join other complainants in filing the bill, this upon demurrer to the whole bill, was held a fatal objection, and on appeal the decretal order overruling the demurrer was reversed with costs, and demurrer allowed with leave to plaintiff to amend by striking out the objectionable

in regard to the object of the suit, or if any or either of them III. have no interest in the subject-matter of the suit, there is a misjoinder. But to be free from the objection of misjoinder, it is not necessary that co-plaintiffs should have an identity of interest.



names, &c. Dias et al. v. Bouchard, Ex., and U. S., 10 Paige R. 464-5, 445.

Misjoinder of parties complainant must be objected to by demurrer or in the answer. It is too late to urge formal objection of this kind for the first time at the hearing. The Trustees of Waterlown v. Cowen, 4 Paige R. 515, 510.

Individuals having no community of interest cannot prosecute their several rights in one bill; as where they merely held in several parcels land derived from the same source and charged with a separate tax under similar circumstances. Armstrong et al. v. Treasurer of Athens Co., 10 Ohio R. 236, 235; State of Ohio et al. v. Ellis et al., Id. 456.

Two or more creditors having judgments on which executions are returned upsatisfied against some debtor, may join in one bill, provided it seems the aggregate sum of their judgments exceeds \$100. Dix et al. v. Briggs, 9 Paige R. 596, 595. If the execution returned unsatisfied was on personalty, as where it issued on a justice's judgment not docketed in clerk's office so as to affect realty, the bill cannot be filed. Ibid.

An administratrix cannot be made co-complainant without assent and if she claim adversely to the prayer of the bill, she has a right to set up her claim, and her name, on motion, will be inserted as a defendant. Dare's Administrators v. Allen's Executors, 1 Green's Ch. R., 288.

On bills implicating the conduct of an acting administrator, brought by his co-administrators, to set aside a sale, on allegation that it was improperly conducted and sold below its value, or on bills of this description, all the executors and administrators of testator or intestate must be parties. In this court, if one of the executors or administrators, who is a necessary party, refuses to join in the suit as a co-complainant, the proper course is to make him a party defendant, stating in the bill the fact that he would not consent to be a complainant in the suit. Where a bill of the above description was filed by two administrators, in the name of all, and one of them swore, on motion by defendant, to take bill off the files and dissolve injunction, that he was the acting administrator, was satisfied the sale was fair, and that the bill was filed without his consent, the court allowed complainant to amend by making the non-assenting administrator party defendant, and by inserting his refusal in the bill, retaining the injunction, but suspending the counter motion of complainant, for a review until bill should be so amended. III. MISJOINDER OF PARTIES AS CO-PL UNTIFFS.

Churchwardens in a suit to restrain the pulling down the church yard wall.

Consignees.

Thus, a churchwarden who has filed a bill to restrain a parson from pulling down the church-yard wall, may, after his year of office has ceased, join as a co-plaintiff with one of his successors in a supplemental bill for the purpose of stating facts which have occurred since the filing of the original bill. Marriott v. Tarpley, 9 Sim. 279.

And where the separate property of several consignees has become mixed and confounded together so as to be incapable of being distinguished, they thereby become tenants in common thereof, and, as such, may join in one bill for an account and equitable set off against the owner of a ship in which such property was shipped, and for an injunction to restrain several actions brought by him against them for freight and average. Jones v. Moore, 4 Y. & C. Eq. Ex. 351.

Executor of deceased representative a codefendant with the sole existing representative. And in a suit for an account of the assets of a deceased debtor, the executor of the person who was the original administrator de bonis non, and personal representative of such debtor, is properly joined as a co-defendant with the person to whom, on the death of such original administrator, a fresh administration de bonis non was granted, and who thereby became the sole existing personal representative of such debtor. Holland v. Prior, 1 M. & K. 237, (decided by Lord Brougham, C., overruling the decision of the Vice-Chancellor.)

Legatees coplaintiffs with an executor. Again a bill is not demurrable on the ground of the joinder of legatees as co-plaintiffs with an executor, in a suit for a debt due to the testator's estate. Rhodes v. Warburton, 6 Sim. 617.

Mortgagee a coplaintiff with a settlor.

But if a mortgagee of the interest of a settler under a settlement joins with such settler as a co-plaintiff in a bill to set aside the settlement, the mortgagee can obtain no relief by a suit so constituted. Bill v. Cureton, 2 M. & K. 503.

Occupiers coplaintiffs in injunction bill to restrain a nuisance.

And the respective occupiers of several houses cannot join in a bill for an injunction to restrain a nuisance; for that which is an answer to one may not be an answer to another. Hudson v. Maddison, 12 Sim. 416.

Joinder of retired, new, and continuing partners, as co-plaintiffs. In a bill against a former partner in respect of a private advantage clandestinely obtained by him, a partner who retired

But if such amendment were not made in a time fixed, the motion to take the bill from files and dissolve injunction should prevail. Tooker et al. v. Oakley. 10 Paige Ch. R. 289, 288.

before the transactions was discovered, and other persons who subsequently became partners, and the continuing partner, may be all joined as co-plaintiffs. Faucet v. Whitehouse, 1 Russ. & My. 132.

III. MISJOINDER

Shareholders.

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But where a bill is filed by some of the shareholders of a joint-stock company, on behalf of themselves and all the other shareholders, except the defendants, seeking, among other things, to be protected from a judgment against the company certain other shareholders who had been released from proceedings under the judgment on payment of a call of a certain amount, are necessary parties to the suit: but they ought not be co-plaintiffs; and, inasmuch as such persons, if not named as defendants, must be regarded as plaintiffs under the general description of other shareholders, the billis demurrable on the ground of misjoinder, if it does not name them as defendants. Lund v. Blanshard, 4 Hare, 9. But see Apperley v. Page, infra, p. 415.

And if a personal representative of a trustee by whose neg- Personal repre-And if a personal representative of a trustee by whose neg-sentative of a lect an opportunity of committing a breach of trust had been person seeking afforded, is joined as a co-plaintiff with parties seeking relief in respect in respect of such breach of trust, and it may be necessary to trust. resort to the trustee's assets for the purpose of making good the loss, the bill will be dismissed, because the interests of the co-plaintiffs might ultimately become conflicting. Jacob v. Lucas, 1 Beav. 436.

Where a bill is filed by a lessee of tithes, and by the vicar vicar a co-plainfor the recovery of tithes, if the lease of the tithes was by pa- tiff with a lessee of the tithes. rol, the vicar is properly joined as a co-plaintiff with the lessee of the tithes; but if the lease was by deed, there is a misjoinder. Foot v. Bessant, 3 Y. & C. Eq. Ex. 320.

A bill brought for an account and for an injunction to re- Joinder in a bill strain proceedings at law, cannot be demurred to on the ground coedings at law, that the plaintiffs in equity are not all defendants at law, where equity who lime to defendant at law, where equity who lime to defendant of a plaintiff in equity who lime to defendant of a plaintiff in equity who lime to defendant of a plaintiff in equity who lime to defendant of a plaintiff in equity who lime to the equity who lime to be a plaintiff in equity who lime to be a the plaintiff in equity who is not a defendant at law has an atlaw. equal interest with those who are defendants at law. Darthez v. Lee, 2 Y. & C. Eq. Ex. 12.

The joinder of a person as a co-plaintiff who is not entitled Joinder of a person having no to any relief, though he is interested in the subject-matter of right to relief. the suit, is a ground for dismissing the bill with costs against all the plaintiffs, even though the objection be only taken by

answer, and not by demurrer or plea. So that where a fund is lost in consequence of the tenant for life insisting on a trustee placing it in the hands of another person, and the tenant for life, who, of course, is entitled to no relief, joins with the persons interested in remainder, in a bill against the trustee to make him liable for the loss, the bill will be dismissed, even though the objection be not taken except by the answer. Goodyear v. Robinson, 4 Law J. (N. S.) 174, M. R.

For other cases connected with the question of misjoinder. see supra, note, p. 27, and note, p. 30, and note, p. 177, and note, p. 272. See also Mocatta v. Ingilby, and Taylor v. Salmon, infra, p. 414.

IV. PARTIES TO SUITS OF A PUB-

discovery.

IV. PARTIES TO SUITS OF A PUBLIC NATURE* (1).

The attorney-general may be made a defendant to a bill of discovery relating to matters not within his private or official at war made par-ties to a bill of knowledge or cognizance, and other public officers (the secretary of war, for instance,) may be made defendants to a bill in their public character. Deare v. Attorney-General, 1 Y. & C. Eq. Ex. 197.

> * See Section VII., on " Parties to Suits affecting persons having a community of interest."

> (1) The superintendents of the poor cannot file a bill against a husband for county expenses in support of his wife as a lunatic or pauper until they exhaust their remedy at law by judgment and execution returned unsatisfied. The superintendents are by statute a corporation, and where it is proper to bring a suit in their official capacity it ought to be in the corporate name given to them by statute, not as in this case, in their individual names with their official description. But these are matters of form which may be obviated by amendment. Pomeroy v. Wells, 8 Paige R. 409, 411, 406.

> Where a state statute authorizes suit against a county as against an individual, as in Michigan, (but in Massachusetts, on a judgment against a town or county, the property of any citizen is liable. 6 Metcalf, 552, cited ut supra, p. 582.) A creditor's bill may be filed against a county, to subject equities belonging to the county, such as bonds, mortgages, &c., which could not be reached by execution, on judgment recovered at law, and nulla bona returned, and this, notwithstanding a mandamus might have issued to compel public officers to do their duty, and in Michigan to compel the supervisors agreeably to

Where a suit is instituted respecting money given for super- IV. PARTIES TO SUITS OF A PUBstitious uses, and it is doubtful whether it will be for the queen, under her sign manual, to direct the application of the money to other charities not superstitious, or whether the mo- ral, in a suit as ney will revert to the settlor by virtue of a condition invested the superstiin the deed for that purpose, the attorney-general is a necessary party. De Themines v. De Bonneval, 7 Law J. (O. S.) 35.

statute to levy a tax to pay the judgment. Lyell v. the Board of Supervisors of St. Clair Co., 3 McLean, 580.

In New-York, the chancellor decided that a bill in nature of a judgment creditor's bill, lies by board of supervisors of a county to collect a tax from equitable assets, on return of collector that no visible property of debtor can be found, out of which the tax can be levied. Supervisors, &c. v. Durant, 9 Paige R. 185-137, 182. But the decision was reversed in error 10 to 8. 26 Wend. 66.

The grantee of a lot adjoining a public square having a special covenant from owner that it shall be kept open, may restrain him from violating the covenant and join the corporation as a party. Trustees of Watertown v. Cowen, 4 Paige R. 514, 515, 510. See Id. 513, et seq. as to the doctrine of dedication of lands in a city or village to be used as a public common, open square, or public walk, a square or "place," dedicated generally to the use of the inhabitants of a town or village, and not conveyed directly to a corporation for corporate purposes, authorizes one or more inhabitants who have property adjoining it, and which is affected in its value by the square, may enforce the execution of the trust, to enjoin the corporation from diverting it to a different public use. It was valuable property appurtenant to the estates of the lot holders, a vested right which the legislature could not authorize the corporation to change in its character. Le Clerq et al. v. Town of Gallipolis, 7 Ohio R. 354, condensed from 7 Hammond R., 1st part, 217.

Bill in nature of a creditor's bill for satisfaction of a tax, a right without a remedy. The decision of the chancellor in The Supervisors of Albany v. Durant, 9 Paige 185-7, 182, that the jurisdiction of the court extends to a bill in nature of a creditor's bill on return of collectors of a tax unsatisfied, to reach choses in action of bond and mortgage or equitable assets which could not be levied on and the tax collected, that such relief was within the appropriate powers of the court where the remedy at law was inad-quate, that it was sustainable in allowing to the statutory remedy in favor of a judgment creditor on return of execution unsatisfied and was within the equity of that IV. PARTIES TO LIC NATURE. ral, in a suit by an incorporated

The attorney-general is a necessary party to a bill filed by an incorporated charitable institution, for a legacy, where it is to remain invested in stock, and the dividends are to be applied for purposes not corresponding with the trusts upon charitable insti- which the general funds of the institution are invested. poration of the Sons of Clergy v. Mose, 9 Sim. 610.

> statute, but that the statute was merely declaratory of the pre-existing power of the court, as proclaimed in the case of Hadden v. Spader, 20 Johns. Reports, was reversed ten to eight in the Court for the Correction of Errors, 26 Wend. Rep. 66.

> It was there held by Senator Root and the President of the Senate in an elaborate opinion, in which the majority concurred in opposition to the expressed opinions of Justice Cowen and Senators Verplanck and Humphrey, that the opinions given in Hadden and Spader, that the chancery power extended to reach equitable assets, simply in aid of an execution at law, was not called for by the case, that in that as well as all cases, some known ground of equitable jurisdiction, such as fraud, trust, &c. was coupled with the relief sought and indispensable to such relief, in cases not within the statute authorizing judgment creditor's bills, and that the statute was not declaratory but gave a new remedy previously unknown to the powers of this court, both here and in England, where no such power had existed or was claimed by the High Court of Chancery.

> Therefore that a bill in the nature of a creditor's bill to reach equitable assets not within the reach of a tax warrant, does not lie at the suit of a county to enforce the payment of county taxes, where the warrant for collection has been returned to the county treasurer unsatisfied for want of such property as could be levied on, and that by consequence, a right even in the public might exist until provided for by the legislature without a remedy to enforce it at law or in equity. Durant v. Supervisors of Albany Co., 26 Wend. 66.

> The President of the Senate says, idem. p. 91-92, "that it may be objected that these rules," (meaning chancery powers which he had quoted,) "leave the case of a statute right and an imperfect statute remedy without effectual relief, and that the familiar saying, that 'every right has a remedy,' would therefore become the mere doctrine of a beautiful theory, rather than an operative principle and useful reality. To this I would answer in the language of Chancellor Sanford [whose decision in Donovan v. Finn, Hopk. R. 59, repudiated the assumption of such a jurisdiction prior to the Revised Statutes, in which he has well said, that 'the maxim that every right has a remedy, and that where the law does not give redress, equity will afford relief,

Where a specific injury is done by nuisance to individuals IV. PARTIES TO SUITS OF A PUBresident or having property in the locality of the nuisance, LIC NATURE. any of them may file a bill for relief, without making the attorney-general a party, although such nuisance is a nuisance to ral, in a suit to Spen- ral nuisance. the public generally, as well as to those individuals. cer v. London and Birmingham Railway Company, 8 Sim. 192, 7 Law J. (N.S.) 281. See also Semple v. Birmingham Railway Company, 9 Sim. 212. And where an individual sustains special damage from a nuisance (as where the goods in his shop ral, in a suit to are injured by the smoke of a steam engine), he may file a bill sance. to restrain it, without making the attorney-general a party; although, in the bill he alleges that the nuisance is a nuisance to the neighborhood, and sets forth a letter written by his solicitor to the defendants on behalf of several persons in the neighbourhood. Sampson v. Smith, 8 Sim. 272. And to a bill signees of a person injured by a by a lessee to restrain a nuisance, the lessor is not a necessary nuisance. party. Nor are the assignees of the plaintiff, where he is an uncertificated bankrupt; for an uncertificated bankrupt has a right against all the world, except his assignees. Semple v. London and Birmingham Railway Company, 9 Sim, 212.

A foreign government is a necessary party to a suit instituted ment, in by alleged agents thereof, for the possession of property be-agents former longing thereto, against other persons who were the agents agent thereof, but whose agency is alleged to have been determined. S:hneider v. Lizardi, 15 Law J. (N. S.) 435, M. R.

To an information against churchwardens to establish a Vestry clerk in charity, the vestry clerk may be made a defendant, when he to establish a charity. refuses to allow the relator to examine the vestry book. Attorney-general v. The Churchwardens of St. Margaret's, Westminster, 1 Law J. (N. S.) 127, V. C.

however just in theory, is subordinate to positive institutions, and cannot be applied either to subvert established rules of law, or to give to this court a jurisdiction hitherto unknown.' To this I will merely add, that in many cases the legislature and not the courts can alone furnish to existing rights effectual remedies.

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Foreign govern-

V. PARTIES TO SUITS FOR AN ACCOUNT AND TO ADMINISTRATION SUITS.

- V. PARTIES TO SUITS FOR AN ACCOUNT, AND TO ADMINISTRATION SUITS* (1).
 - 1. Assignee. See Legatees.
- 2. Heir.—The 31st order of August, 1841, declares, "That in suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him." (See Marriott v. Marriott, 15 Law J. 422, V. C. B.)

* See Sections IX., XII., XIII., and XIV.

(1) Under the 2 R. S. 191, § 154, which authorizes complainant to make any person besides mortgagor party, who secures the debt, assignee of a mortgagor, guaranteed by the mortgagee who assigned it, may make him a party to the foreclosure, to have a decree against him for any deficiency in the sale of the mortgaged premises in case the amount should not be collected from mortgagor, who would be primarily liable for such deficiency; and if dead, his personal representatives may, it seems, be made parties for recovering such deficiency, to be paid in due course of administration. But no decree can be against them so as to be executed, until an account of assets is taken, or they admit in answer their sufficiency, and where they are unnecessarily made parties and put to the trouble of an account, the court may refuse complainant his extra costs of taking the account subsequent to the decree of foreclosure. The heirs of mortgagor or guarantor cannot be made parties to reach the realty for a contemplated deficiency. To do that complainant must show the personalty exhausted. Leonard v. Morris et al., 9 Paige R. 91-3, 90.

In a suit against personal representatives of a deceased debtor to recover a debt due from his estate, it is only necessary for complainant to file bill in his behalf, and all other creditors standing in the same situation, where it appears on the face of bill that there will be a deficiency in the fund, and that there are other creditors who are entitled to a ratable proportion with the complainants, such an allegation is unnecessary to enable the court to make a general decree for the benefit of all the creditors, where the answer of the defendant shows that the estate is insolvent, and that there are other creditors who have an interest in the fund. But that principle applies only to a bill filed by a single creditor, or by several creditors, for a debt due to them all. For several creditors having distinct debts against the estate, cannot file a bill for their respective debts without making all other creditors having a common interest with them parties, or stating in the bill that it is

3. Legatees and their assignees and personal Representatives. V. PARTIES TO SUITS FOR AN —Where one of several residuary devisees and legatees files. ACCOUNT AND TO ADMINISTRATION a bill for the administration of the estate, the other residuary legatees may be served with a copy of the bill under the 23rd Residuary legaorder, where they and the plaintiff have a common interest, tees. and they have no other interest. Davis v. Davis, 4 Hare, 389.

filed in behalf of themselves and of the other creditors who have a common interest with them. Where a special claim is made against the personal estate of decedent, adverse to the rights and interests of his general creditors the personal representative need only be party, and his duty is to defend against the claim. A person may be a necessary party within the rule requiring all persons interested to be made parties, although the proper decree may be made as to the subject matter of litigation in his absence if defendant makes no objection. And in such case if defendant neglects to make the objection by plea, answer, or demurrer, of want of parties who are only necessary to protect him from further litigation, the court in its discretion may refuse to sustain the objection at the hearing, or to require the cause to stand over to add new parties in that stage of the suit. Upon a general demurrer to bill by several, for want of equity, the demurrer must be allowed unless it appear that all the complainants have an interest in the subject matter of the litigation. Deas et al. v. Bouchard Ex. and U. S., 10 Paige R. 445, 447-449.

In a bill filed by a creditor of decedent against heirs or devisees for his debt out of lands descended or devised, if complainant cannot ascertain and specify those lands he may specify the fact in his bill and call on the heirs and devisees to discover the lands devised or descended to them respectively and the encumbrances thereon, to enable him to reach those lands.

After the Revised Statutes of New-York went into operation and before July, 1837, the only remedy of a creditor at large was to file his bill against the heirs and devisees. The statutes appear to contemplate that each creditor bring a separate suit for his own debt only, against all the heirs or devisees. It is not therefore necessary for complainant who files a bill under the statutes to make any other creditors parties. Parsons v. Bowne, 7 Paige R. 354.

Where a judgment or incumbrance has been paid but is fraudulently kept on foot by a third person to deprive a creditor of the decedent of his remedy against the statute in lands of heirs or devisees, and by sale of the property for its full value, it seems such third person is a proper and necessary party to a suit against the heirs or devisees. But such incumbrancer is not a necessary party, and therefore defendants cannot demur. Parsons v. Bowne et al., 7 Paige R. 361, 354.

V. PARTIES TO

Legatee or an-nuitant who is to be paid out of a residue.

But "a person to whom a legacy or an annuity is given, to SUTS FOR AN ACCOUNTAND TO be paid out of the residue, after the death of the legatee for life of such residue, is not a necessary party to a suit for an administration of the estate brought by legatees of aliquot shares of the ultimate residue." Fisk v. Norton, 1 Hare, 351.

> A bill by creditor against heirs or devisees of real estate to obtain satisfaction of a debt against decedent under Revised Statutes of New-York, which cannot be filed till three years after administration taken, if it appear the bill has been prematurely filed, the defendant may demur or object in his answer, and the bill will be dismissed, and if it do not so appear, defendant may bring up the fact by answer or plea, and which the statute contemplates must be filed by each creditor, not by one in behalf of himself and all others; he must allege in his bill that the personal estate of decedent was not sufficient to pay his debts, or that after due proceedings before the surrogate and at law, he has not been able to collect his debt out of such personal estate, he cannot consistently with the statute now file a bill against the heirs and personal representatives to obtain his debt. The misjoinder makes the bill multifarious. Butts v. Genung, 5 Paige R. 254, 258-9.

> A bill against representatives of deceased partner for satisfaction of a partnership debt out of decedent's estate, the joinder of the surviving partner with them as a defendant, does not make it multifarious or demurrable by such representatives. It seems questionable whether it was absolutely necessary to make him a party, but he, not they, should make the objection. He is at least not an improper party as to them so as to make the bill multifarious on that account. If no decree can be made against him, for complainants or co-defendants, he alone can make the objection, and if any decree could be against him, it would be for benefit of his co-defendants to relieve the estate or some part from the debt, in nature of a decree for contribution. Butts v. Genung, 5 Paige R. 265, 254.

> It is a privilege given complainant in chancery, to go beyond the party legally bound, to search assets in the hands of others out of which his debt ought to be paid. But if they have no assets, and there is no other special ground assigned, they are not proper parties. Gobel v. Andruss et al. 1 Green's Ch. R. 74, 66.

> A complainant in a suit for mere purpose of recovering a legacy, is not bound to make the representatives of a deceased co-executor parties. when he expressly charges that all the assets are in the hands of the surviving executor. Secus, if the co-executor is charged with assets or when fraud or collusion is charged between the executors or insolvency; and upon the same principle debtors to the testator may be made parties to reach assets in their hands. Ibid, 73, 66.

If in an administration suit, instituted by the next of kin of V. Parties to a testator at his death, the question is, whether the testator by Account IND TO the words "my next of kin," meant his next of kin at his death, or at a future period, the person or persons who may by possibility be the next of kin at that future period, ought to named as legabe made a defendant or defendants, as well as the executor. Urquhart v. Urquhart, 13 Sim. 613.

Next of kin

So where a limitation is for the next of kin or personal re- Chaimants under presentatives of a settlor, in a due course of administration, a will, distributees under a foraccording to the statute of distributions, and such settlor leaves a wife surviving, and a sole next of kin, and the next of kin files a bill for the property; the wife of the settlor or her next of kin are necessary parties or a necessary party; and so also are persons to whom the property has been paid over in a former suit. Kilner v. Leach, 7 Beav. 202.

The assignee of a legatee is a necessary party to a suit by such legatee for the administration of the testator's estate, where the assignment took place before the institution of the Campbell v. Dickens, 4 Y. & C. Eq. Ex. 17.

Assignee of a

And where a residuary legatee assigns his share after the institution of a suit for administering the testator's estate, but before such legatee is served with a subpæna, the assignee is a necessary party. Humble v. Shore, 3 Hare, 119.

Where a bill is filed for the purpose of having the residue Personal repreof a testator's estate ascertained, and for the distribution of it legatee. among the parties entitled, the suit will be defective for want of parties, if there is no personal representative of one of them constituted by the proper ecclesiastical court in England, although the bill states that a person has proved the will of such person in a diocesan court not in England. Lowry v. Fulton, 9 Sim. 104.

4. Partners,-A surviving partner of a testator may be Partner of the testator, in a suit joined as a co-defendant with an executor to a bill filed for an for an account account by the residuary legatees, and may be thereby re-cutor. quired to account to them in respect of the assets in his hands as a partner. Browsher v. Watkins, 1 Russ. & M. 277; Da. vies v. Davies, 1 Keen, 534.

5. Personal representatives of the person whose assets are the ministrator, and subject matter of the suit.—In a suit for a general account and not madministrator at direct. administration, the estate must be represented by a general

V. PARTIKS TO ADMINISTRATION

Executor who has not proved.

administrator, and not by a mere administrator ad litem. ACCOUNT AND TO Croft v. Waterton, 13 Sim. 653.

An executor who has not proved or acted is not anecessary party, even though he has not renounced. And it is not necessary to allege that one of two or more executors has not proved, in order to exempt the plaintiff from making him a party. It is sufficient if the bill alleges that those who are made parties have proved, and are the personal representatives of the testator. For the fact of the other person not having proved may be easily established by the production of the probate. Dyson v. Morris, 1 Hare; 413; Davies v. Williams, 1 Sim. 5.

405 Personal repre-sentative constituted in England in a suit as to as sets originally

Where a suit is instituted for the purpose of securing a residue remitted by an executor constituted in India, to an agent in this country for distribution amongst the parties entitled, it is necessary that an administrator should be constituted in or actually out the jurisdic- England, and made a party to the suit. Logan v. Fairlie, 2 Sim. & Stu. 292. And even where a suit is instituted respecting an unadministered part of a testator's estate which has been remitted from India, and is in the hands of an executor residing here, but constituted in India, a personal representative constituted in England is a necessary party. Bond v. Graham, 1 Hare, 482. And a bill seeking account of the assets of an intestate who died in India, which have been possessed by a personal representative constituted by the proper court there, cannot be sustained in the absence of a personal representative of the intestate constituted in England, although it does not appear that the intestate had any assets in England and consequently no letters of administration have been taken out in this country. Tyler v. Bell, 2 My. & C. 89. And in like manner to a suit instituted for an account of assets of a testator possessed by an executor in Honduras, an executor constituted in this country is a necessary party. Lewis v. Gentle, 7 Law J. (O. S.) 43, Ch. R. Where, however, a clear ascertained fund is remitted from abroad by an executor to a person in England, to apply it for the benefit of the legatees thereof, the court will determine the respective rights of the several legatees, without having a legal personal representative of the testator before the court, if the consignee is a party to the suit; at least if no objection be made by the defendants on the ground of the personal representative not being made a party. Arthur v. Hughes, 4 Beav. 506.

6. Personal representative and assignees of a personal repre- Suits for an sentative of the individual whose assets are the subject matter of Account and to the suit.—Where a bill is filed against executors who proved their testator's will and possessed his assets in India, and the Personal reprebill seeks to charge them with a loss, and one of them dies in sentative in En-India, and his executor, who proved his will and possessed his dian executor. assets there, and afterwards came to England, is made a party to the suit, it is not necessary that a personal representative in England of the deceased executor should also be before the Anderson v. Caunter, 2 M. & K. 763..

Assignces and

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In an administration suit against a surviving executor, it is personal not necessary to bring before the court the assignees or personal representatives of a deceased bankrupt executor, all of rupt executor. whose estate has been administered under the commission. Masters v. Barnes. 2 Y. & C. Ch. C. 616.

Where an agent is employed by two executors, the survivor Personal repreof them may file a bill against such agent for an account. with- deceased execu out making the personal representatives of the deceased exe- a surviving ex cutor parties to the suit, Slater v. Wheler, 9 Sim. 156.

7. Purchasers.—Where a bill is filed by the next of kin of Purchasers in a an intestate against his administrator and others, praying that kin of an intestate who had an account may be taken of the rents and profits received by contracted to the administrator of estates contracted by the intestate to be sold to different purchasers, and agreed by the heir-at-law to be given up to the next of kin in case the purchase contracts should be set aside, and also praying that the balance after deducting the administrator's disbursements may be invested and secured for the plaintiffs and the other persons entitled thereto, and that a receiver may be appointed; in such case the purchasers are necessary parties. First, because otherwise the administrator would be obliged to render the same account twice-once to the next of kin (admitting them to be entitled to what they seek,) on the ground that the plaintiffs may not be able to recover the purchase monies, unless the rents are properly accounted for and applied-and once to the purchasers, to whom, if the contracts are valid, the rents and profits belong. Secondly, because the purchasers would not be bound by the acts of the receiver without being parties to the cause. And thirdly, because the court does not take possession of a fund, without having the owners of it parties to the suit. Lumsden v. Fraser, 1 My. & C. 589.

tor, in a suit by an agent.

V. PARTIES TO SUITS FOR AN ACCOUNT AND TO ADMINISTRATION

Party to a bill

Other Parties.—Although upon a bill for a general account between two persons, a question arises whether certain items ought to be charged against one of them or against a third person with whom they had mutual dealings it does not folfor an account low that such third person is a necessary party. Darthez v. Clements, 6 Beav, 165.

Co-plaintiff havnute interest.

In a suit for an account, a person may be made a co-plaintiff, if he has an interest in the taking the account, however mipute such interest may be. Smith v. Farr, 8 Law J. (N.S.) Ex. Rep 46.

Plaintiff in a suit for administer-ing real assets.

The administrator ought not to be sole plaintiff in a bill for administering an intestate's real assets, under the statute Tubby v. Tubby, 2 Coll. Ch. C. 136. 3 & 4 W. IV. c. 104.

A person who has possession of part of another's assets.

A person who has improperly obtained a part of the assets from executors, by setting up a deed of assignment of the property to himself, may be made a party to a bill against the executors for the administration of the estate, even without any charge of collusion or insolvency. Consett v. Bell, 1 Y. & C. Ch. C. 569.

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Parties in a suit for an account of rents.

If two individuals are entitled to rents, the one up to a certain time, and the other afterwards, the latter alone cannot file a bill for an account of the rents accrued during the whole period, without making the former a party, although he may allege that he has satisfied the demands of the former. Gen. v. Pearson, 7 Sim. 290.

VI. PARTIES TO SUITS PERTAIN-ING TO THE RE-LATION OF AS-SIGNOR AND AS- VI. PARTIES TO SUITS PERTAINING TO THE RELATION OF ASSIGNOR AND ASSIGNEE* (1).

SIGNEE Assignor of a judgment, in a suit by the assignee.

The assignor of a judgment, as having the legal estate, is a necessary party to a suit by the assignee respecting it, although a power of attorney to sue is contained in the assignment. Partington v. Bailey, 6 Law J. (N. S.) 179; M. R.

* See note to p. 398.

Parties' demurrer.

C. & H., insolvent, assigned all their property to an assignee in

⁽¹⁾ Assignee of the right of dower may state the assignment and sue in her own name, but the right to be perfected is still assignor's, and being legal not equitable, is subject to the incidents which the law attaches, and among them the legal rule for applying the statute. The case is as if the dowress was plaintiff. Wilson et ux. v. McLenaghan, 1 McMullan Eq. Cases, S. Carolina, 39, 35.

If a person entitled to purchase money or compensation WI. Parties to suits person money to be ascertained by the award of a commissioner united to the Residence of the Commissioner united to purchase money or compensation WI. Parties to suit the commissioner united to purchase money or compensation with the commissioner united to purchase money or compensation with the commissioner united to purchase money or compensation with the commissioner united to purchase money or compensation with the commissioner united to purchase money or compensation with the commissioner united to the co der an inclosure act, assigns away his interest before the SIGNOR AND ASaward, he is not a necessary party to a suit by the assignee for the recovery of the money; because before the award, he Assignor of comhad only an equitable right to it, and after the assignment of purchase money that, no interest remained to him. Cator v. The Croydon Canal Company, 4 Y. & C. Eq. Ex. 405.

trust, to pay debts, and re-assign surplus if any, or hold it on such trusts as they appointed; the assignors, or their representatives, are necessary parties to a suit of the creditors of C. & H. against the executor of the assignee for an account, as they had a common or connected interest with the complainants in taking the account of the application of the assigned property; but where defendants had not taken the objection that the assignors had not been made parties, either by his demurrer upon the record or ore tenus at the hearing, it could not be taken upon an appeal from the order overruling the demurrer. Dias et al. v. Bouchard, Executor, &c. and U. S., 10 Paige R. 445. But if the objection for the non-joinder was not taken or pointed out by the demurrer put in, nor ore tenus at the hearing it could not on appeal from the order overruling the demurrer. Dias et al. v. Bouchard, Executor, &c., and the United States, 10 Paige Ch. R. 446, 458-9.

When there is an assignment to pay debts and re-assign surplus, the creditors of assignor on bill for account against the assignees, should join the assignors as parties, as they had a common or connected interest with complainants in taking account of the application of the assigned property, but demurrer for want of parties should point out the necessary parties either by name or in such manner as to point out to complainant the objection to his bill, and thus enable him to amend; cites Mitford 180, 4th London edition. The rule thus given by Lord Redesdale has been doubted, 4 Myl. & Craig. 32, sed vid. 1 Dan. Ch. Pr. 386. But in adherence to the spirit of the rule as laid down by Lord R., the demurrer must point out the necessary parties by name in reference to some statement of their names in the bill, or by their characters as the heirs, devisees, personal representatives, assignees, creditors, &c., of some of the persons named or referred to in the bill. Ibid. 447, 454, 465.

The complainants in this court must be the real parties in interest where a case in action is absolutely assigned. The assignee of a judgment or chose in action cannot file a bill in name of assignor who has parted with all his interest in the subject, and is a mere nominal complainant. Field v. Maghee, 5 Paige R. 540, 539.

VI. PARTIES TO

To a suit instituted to compel the raising of portions, for SUITS PERTAIN.
ING TO THE REwhich a term had been created under a settlement, the person BIGNOR AND As- to whom such term has been assigned in trust for a mortgagee with notice of the trusts of the settlement, is a proper party Assignee of a but the original termor is not a necessary party. or, in a suit to Lord Waterpark, 8 Law J. (N. S.) 214, V. C.

> Though at law an assignment might be valid to transfer the value of the property, or right, if no fraud, but where an assignee seeks the aid of the court of equity to enforce his claim, the court will examine into the consideration of the assignment, nature and value of the fund, or estate assigned, and the relation of the parties, for the purpose of doing that equity which the circumstances may require and will get, and an assignment as improvidently obtained where an undue advantage has been taken of a person ignorant of his rights and unapprized of the nature of his claim, and especially will the court examine into the character of the transaction when the parties stand in the relation of guardian and ward, or parent and child. Hence, a bill by a father to obtain a fund held in trust by will, of his son, who on going to sea assigned it for apparently valuable consideration, it was held that the son and his minor child should be parties, and that complainant must prove the consideration, the court regarding the assignment in equity good only for the amount advanced. Haskell v. Codman, 8 Metcalf Mass. R. 543-4, 536.

> A creditor to carry into effect an assignment of debtors' property, and to obtain his share, the other creditors provided for in the assignment should be parties or the bill be filed in behalf of complainant, and all others who may choose to come in under the decree, p. 33. But if a judgment creditor is acting in hostility to the assignment, and is seeking to set it aside, on ground that assignee is endeavoring to retain the property of debtor under an assignment fraudulent and illegal, in such case, the creditor cannot file bill in behalf of himself and those whose claims he is opposing, p. 33. It is not necessary for him to make the creditors so provided for in the assignment, parties. In suit to set aside an assignment as fraudulent, it is sufficient to make the fraudulent assignors and assignees parties, p. 34.

> Assignees in trust for creditors are considered so far entitled to represent the interest of all the creditors provided for in the assignment. as to be permitted to file a bill in their own names relative to the trust estate without making those creditors parties, p. 34. Wakeman v. Glover et al, 3 Paige R. 33, 34, 23. Affirmed on appeal from Ch. 11 Wend. R. 187.

> So far as to property, on which no creditors has a lien by judgment or execution, a creditor may file bill for his own benefit, without other creditors standing in same situation as parties. Ibid. 33.

Where a defendant assigns the subject-matter of a suit after VI. Parties to Suits Pertain-the bill is filed, but before the subpæna is served, the assignee ING TO THE REis a necessary party. Powell v. Wright, 7 Beav. 444.

Where a partner in two distinct firms assigns his share to a co-partner in those firms, who undertakes to indemnify the as- Assignee of a defendant besignor against the liabilities of those firms, a suit may be instisignor against the liabilities of those firms, a suit may be insti- fore service of a specific performance of the agreement, and for an account estate. and payment of what is due to the assignor in respect of the unpaid consideration, and of a sum to which one of the firms was indebted to the assignor, and of the debts paid by him against which he was to be indemnified by the assignee: and in such case a partner in the firm who was so indebted to the assignor is not a necessary party; nor are the devisees of the real estate of the assignee, where the bill charges that his personal assets are sufficient for payment of his debts, although he charges his real estate with payment of his debts; for his personal estate is primarily liable. Morrall v. Pritchard, 6 Jur. 966, V. C. W.

SIGNOR AND AS-

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VII. PARTIES TO SUITS AFFECTING PERSONS HAVING A COMMUNITY OF INTEREST* (1).

1. Statutory mode of suing .- Some of the shareholders of a joint-stock company may sue on behalf of themselves and the shareholders the other shareholders, for the purpose of compelling the behalf of them chairman and directors of the company to refund monies im- serves against properly drawn by them from the company and applied to chairman and directors. their own use, notwithstanding an act of parliament passed for the regulation of the company provides that all proceedings

VII. PARTIES TO PERSONS HAVING A COMMUNITY OF

Bill of some of

* See Sec. XIV., XV. See note to p. 398.

(1) A subscriber to a joint-stock corporation who complains of an Bill, parties. inequitable distribution of the stock, and seeks to reach stock improperly assigned or apportioned to others, should file his bill in behalf of himself, and all other subscribers standing in the same situation, unless the bill shows they have relinquished their rights. After distribution of stock, the commissioners of apportionment are not the trustees of, and do not represent the interests of, other persons to whom the stock is distributed. It seems the stockholders them-

INTERLET

VII. PARTIES TO by or on behalf of the company, against any person or per-PERSONS HAVING SONS, whether a member or members of the company or not, shall be carried on in the name of the chairman or of one of the directors: for such an enactment does not apply to such a case as that above mentioned, where the chairman and directors are themselves the parties amenable to the proceedings. Hichens v. Congreve, 4 Russ. 562.

> selves, so far as known, should be parties to suit which is to affect their rights, prior to the organization of the company by the election of directors. Ibid. Walker v. Derereaux, 4 Paige R. 246-7, 229, cites Egberts v. Wood, 3 Paige R. 520.

> Parties on single bill to stay proceedings at law, all the defendants at law, if the defence was common to all, or went to the whole cause of action against any of defendants, are necessary parties. Paterson v. Bangs, 9 Paige R. 634, 627.

Certainty, relief, defendant should not be surprised.

A more liberal cast is allowable in pleadings in equity than at law. And though it has been held that the like certainty should proceed in both, (see Mitford, 285,) yet in general, certainty to a common interest, a reasonable certainty sufficient to prevent the adverse party from being taken by surprise, is all that equity requires. In setting out the title on which the case rests, defendant should be distinctly informed of the nature of the case which he is to meet. Although setting forth the title in alternatives may not be sufficient, yet where the title to relief will be precisely the same in each case, the bill may be brought with a double aspect, and the plaintiff may aver facts of a different nature which will equally support his application. Story Eq. R. δ 254; Story Eq. Pl, δ 240 to 255, 258, and note; 1 Chitty on Plead. as to the doctrine of certainty.

Every fact essential to his title to maintain his bill and obtain relief, must be stated in the bill, for no facts are properly in issue unless charged in the bill, and of course no proof can be generally offered of facts not in the bill, nor relief granted for matters not charged, though they appear from other parts of the pleadings and evidence, for the court decrees secundum allegata et probata. The reason is, that the defendant may be apprized by the bill what the suggestions and allegations are against which he is to prepare his defence. Story Eq. Pl. § 257.

So in England a judgment creditor's bill, seeking to enforce his security against defendant's equitable interest in freehold, must allege an elegit sued out, or a bill alleging defendants had goods of the debtor and praying discovery, must aver execution sued out on the judgment,

And where an act of parliament for forming a joint-stock VII. Parties 10 company authorizes all suits on behalf of the company against Persons HAVING any person to be prosecuted in the name of the chairman; and in all proceedings in which it would have been necessary Bill by a chairto state the names of the shareholders, it is made sufficient to man of a company against a state the name of the chairman only; the act does not autho- member. rize suits by the chairman against a member of the company, but only against a stranger, without making the other members parties. Macmahon v. Upton, 2 Sim. 473.

for until then the goods were not bound by the judgment, and consequently he would have no title to the discovery. Story Eq. Pl. 257, 4th ed. Though plaintiff has an interest in the subject, yet if not a property title to sue, demurrer lies. Want of interest in the subject of suit, or of title to institute it, are objections to bill, to any kind of relief, or for discovery merely. Mitf. 155-7, cited Story's Eq. Pl. § 260-1. There must also be sufficient averments to show that defendant also has an interest in the subject matter, and is liable to answer to plaintiff therefor. Mitf. 160. For plaintiff may have interest in the subject and right to sue, yet have no right to call on defendant. This may be for want of privity between them. Story, § 262.

So if the right is founded on defendant having notice, it must be charged directly, else it is not matter in issue on which the court can act, and if the notice is to be proved by confessions to witnesses, it seems proper, and as decided in England, indispensable to give on the bill dates of same and names of witnesses. Id. § 263, and see 264. The rule is now established in England, that if bill relies on confessions, conversations or admissions, written or oral, as proof of facts charged, as for example fraud, what such confessions, &c., must be, must be expressly charged, and to whom made, else the proof is inadmissible. The ground is, that otherwise defendant may be taken by surprise and entrapped, since he cannot know that any such evidence is intended, as the interrogatories put by plaintiff to witnesses are not made known to him. But the doctrine is denied in Smith v. Burnham, 2 Sumner's R. 612, and held that it is the generally received impression in America, that it is only necessary as to the facts to be put in issue to charge the facts in the bill, but not to state all the materials of proof and testimony by means of which those facts are to be supported. The authority of Hall v. Malthy, is not of sufficient authority for the doctrine. And the cases of Whetley v. Martin, 3 Beavan's R. 226, and Graham v. Cluse, Id. 124, are very much qualified by V. C. Wigram in Malcolm v. Scott, 3 Hare R. 39, 63. Story, § 265, a.

This is the principle on which the insufficiency of ambiguous state-

BUITS AFFECTING
PERSONS HAVING
A COMMUNITY OF
INTEREST.

Bill of two members of an incorporated company, on behalf of themselves and others.

VII. PARTIES TO

Where the majority of the proprietors of a company incorporated by act of parliament, at a special general meeting assembled, are empowered by the act to institute proceedings, two of them cannot file a bill on behalf of themselves and others against the directors, impeaching transactions which may possibly be regarded by theother proprietors as beneficial to the company. Foss v. Harbottle, 2 Hare, 461.

ments has been put. The title must be stated with sufficient particularity and detail to enable defendant to meet the case upon some definite issue. Ib.

So general certainty is sufficient in equity pleadings, though general charges in a bill, unaccompanied by specific acts of fraud error or account, &c., is insufficient, yet it does not follow that plaintiff must set forth all the minute facts; the general statement of a pecise fact is often sufficient and the circumstances to confirm or establish it need not be, but often are, charged, for they more properly constitute matters of evidence than of allegation. Chitty on Pl. § 251-3-4.

It is a general rule, that what is essential to plaintiff's rights, and necessarily within his knowledge, must be alleged positively and with precision. Story Eq. Pl. § 255.

Even when the fact rests within the knowledge of the defendant, if it constitute a material allegation in the bill, and is the foundation of the suit, it must be clearly stated. *Id.* δ 256.

But by the rule of the late court of chancery in New-York, facts might be alleged positively, or on information and belief, and the statute was framed to meet such mode of allegation, that is, that the bill was true of his own knowledge except such matters as were stated on information or belief, and of those that he believed them to be true. By the new code of procedure, the plaintiff states his case in his complaint in plain language, without any other guide as to the nature of his averments in point of positiveness. All he has to swear to is his belief. Code, tit. 12.

The bill should not be what is technically termed multifarious. Mitf. 181. Story, δ 271. That which appears in Mitford under demurrer is transferred by Story under bills.

Several judgment creditors may unite in one bill against their common debtor and his grantee to remove impediments, for the fraud in such case affects all and they may jointly sue, and all the defendants are implicated in degrees and proportions and may be jointly sued. Brinkerhoff v. Brown, 6 Johns. C. R. 130; Ch. Kent, id. 157, says, "the principle to be deduced from these cases, is that a bill against several must relate to matters of same nature, and having a connection with

2. Persons suing and being sued on behalf of themselves and VII. Parties to suits affecting others, where there is no statutory mode of suing or defending.— Persons having "It is the duty of the court to adapt its practice and course of INTEREST. proceeding, as far as possible, to the existing state of society, Duty of meeting and to apply its jurisdiction to all those new cases, which the exigences from the progress daily making in the affairs of men. must con- state of society tinually arise; and not, from too strict an adherence to form and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy." Lord Cottenham, C., in Taylor v. Salmon, 4 My. & C. 142.

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each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct." So in Fellows v. Fellows, 4 Cow. R. 682; S. T. 9 Paige, 595, 60; see also 5 Id. 65; 1 Sandford, 366. Story Eq. Pl. § 286, n. 2, says, without meaning to question the doctrine in 6 Johns. C. R. and 4 Cow. R., it may be doubted whether there are any English authorities that fully carry out the proposition or are easily reconcilable.

If one of two having common interest in the relief sought against a joint contract (as where one was a surety and the other a principal to an usurious note, and the bill was filed by the surety against the holder for usury to restrain him from proceeding at law on the note, and the principal or maker of the note being made also defendant, to which the holder put in a special demurrer, on ground that the maker of the note was made defendant instead of complainant) the court held that if one of two having a common interest, refuses to join in filing a bill, the other may make him a defendant alleging in the bill as an excuse for doing so that he would not consent to join as a complainant, or stating some other excuse for making him defendant instead of complainant. If the bill does not state such excuse the other defendants may demur, but as it is an objection of form, the bill may, of course, be amended on the usual terms. Morse v. Hovey and another, 9 Paige R. 198, 197.

A bill in Massachusetts under Revised Statutes, c. 44, by a creditor against an insolvent bank, is substantially a bill for the benefit of all creditors, and plaintiff has no power to discontinue it. Atlas Bank v. Nahant Bank, 23 Pick. 480.

Where separate judgments and unsatisfied executions were against drawer and endorser of a note, it seems, one creditor's bill, may without the risk of demurrer for multifariousness, as both judgments are for same debt, even where some costs were in each judgment for which

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Doctrine of representation.

"The court in conformity with the principles of equity has adopted a general rule, not to dispose of any matter, not to bind any man's interest, or make any declaration of any man's right in his absence. The complication of human affairs has, however, become such, that it is impossible always to act strictly on this general rule. Cases arise in which if you hold

the defendants in the other were not liable, be filed against both (showing to excuse costs that the endorser has assets over \$100.) but the judgment creditor is not bound to file his bill against them jointly. If, however, he unnecessarily pursues the endorser separately, when he knows or has reason to believe the maker has ample means to pay, and that his property might be reached by a joint bill against both, he will not, it seems, be allowed his costs of the separate bill, Austen et al. v. Figueira, 7 Paige R. 56, 58-9.

Parties. Creditors. General principle, all parties. A bill to enforce a trust created, as it may be for the benefit of third persons, they being certain scheduled creditors, it was held that all must join, or if the suit be brought by one, it be for the benefit of all.

It is true that a creditor whose remedy at law has been exhausted, may in certain cases, file a bill for his own benefit only, and without making other creditors standing in the same situation parties. But when he seeks to carry into effect an assignment in trust for the benefit of creditors, and to obtain his proportion of the trust fund, he is bound to make all the creditors parties; or some of the creditors may sue in behalf of themselves, and the other creditors who may come in and obtain satisfaction of their demands equally with the plaintiffs in the suit. And if they decline to close they will be excluded from the benefit of the decree, and will nevertheless be bound by the acts done under its authority, (citing Mitford Pl. 135; Edmenston v. Lyde, 1 Paige, 637, and other authorities.) The form of proceeding, while it prevents delay and the multiplicity of suits which are never to be encouraged, furnishes the court at once with the means of administering equal justice to all parties interested. Bryant v. Russel, 23 Pick. R. Mass. 522-3, 508.

A bill for injunction and relief against judgment at law; a plea of judgment in law supported by answer if not replied to, will be considered as true on argument. Cammann v. Ex'r of Trapkagan, Saxton Ch. R. (N. J.) 30, 28.

Parties, multifariousness. While care must be taken to bring all proper parties before the court, equal care should be taken that none are brought there whose rights are not to be in some way bound by the decree that may be made.

it necessary to bring before the court every person having an VII. PARTIES TO interest in the question, the suit could never be brought to a Persons having conclusion. The consequence would be that if the court adhered to the strict rule there would in many cases be a denial of justice. This has induced the courts to sanction a ralaxa-

So too, while the court will, for sake of avoiding multiplicity of actions, take cognizance of suits in which many rights having reference to one subject matter are united, it must be careful not to admit several plaintiffs to demand by one bill, several matters perfectly distinct and unconnected. The rules of pleading in a court of equity are not so technical and precise as in the courts of law. The general powers of this court and its peculiar modes of administering relief, authorize and require a greater degree of liberality than would be expedient in the courts of common law. Still when principles have, by repeated adjudications, become settled, and especially when, they are founded in justice and the fitness of things, it is quite as important that those principles should be preserved in this as in any other court. Marselis et al. v. The Morris Canal & Banking Co., Saxton Ch. R. (N. J.) 35, 31.

When a number of persons claim one right in one subject, one bill may be sustained to put an end to suits and litigation. Idem. 36.

The cases where unconnected parties may join, are where there is one common interest in them all centering in the point in issue. Id. 36.

Lord Redesdale, in Whaley v. Dawson, 2 Sch. & Lef. 367, held this principle, where there was a general right claimed by the bill covering the whole case, the bill would be good though defendants had separate and distinct rights; but if the subjects of the suits were in themselves perfectly distinct, a demurrer would be sustained. Id. 36, 37.

In Coop. Eq. Pl. 182, the rule is, the court will not permit several plaintiffs to demand by one bill several matters perfectly distinct and unconnected against one defendant, nor one plaintiff to demand several matters of distinct natures against several defendants. Id. 37. principle there laid down in Cooper is the correct one. Id. 38.

A bill by sureties of custom-house bond paid by them to be substituted for the obligees in each bond, and to settle their rights to priority out of the principal debtor's estate, all persons standing in like situation with complainants should be parties, or the bill should be filed in behalf of complainants and all others who were sureties on bonds given by the debtor for duties and paid them, so as to be entitled to be subrogated to the rights and remedies of the United States against the assigned fund. Dias et al. v. Bouchard Ex'r and U. S., 10 Paige R. 447, 455-6.

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VII. PARTIES TO tion of the rule. And accordingly they have said, if we can be satisfied that we have before the court persons whose interests are the same as the interests of those who are absent, we will be content to hear the cause upon the argument of such persons. And if we are then satisfied that the case has been fairly and honestly presented, we will order the distribution of the fund on the representation of the persons present," but without binding the absent parties, so far as to cut them off from all chance of correcting any error which in consequence of their absence may have been made to their prejudice. Lord Langdale, M. R., in Powell v. Wright, 7 Beav. 449, 450. See also his Lordship's remarks in Richardson v. Hastings, 7 Beav. 323.

> The adjudication in the absence of some of the persons in these instances does not depend upon the fact of there being any actual representation of the absent persons. For they may be perfectly ignorant of the proceedings: and in case those who are brought before the court are defendants, they are selected by the plaintiff, and not by the absent persons. "It is a rule of necessity or convenience; and nothing is more vague: for the court is under the necessity of considering the circumstances of each case and the degree of difficulty in the proceeding."-The fact would seem to be, that there is no actual representative existing as a ground for the adjudication in the absence of persons interested; but that there is a virtual and constructive representation for the purpose of the adjudication, as the result of considerations of necessity or convenience and community of interest. Necessity or convenience, combined with community of interest, and not representation, is the criterion for deciding whether such adjudication shall take place. See Powell v. Wright, 7 Beav. 446, 447, 450, and Smart v. Bradstock, 7 Beav. 501.

Mode of treating of this subject.

Since the rule as to dispensing with the presence of persons as actual parties on the record is so "vague," and the "court is under the necessity of considering the circumstances of each case," it will obviously be highly desirable for the safe guidance and the convenience of the practitioner, to incorporate the material circumstances of each case into specific placita, rather than to state propositions couched in more general terms. This remark, indeed, applies with more or

2 S. & S. 91.

less force to the whole subject of equity pleadings; but it is VII. PARTIES TO peculiarly applicable to the subject of parties, and perhaps Persons Baying most especially to that part which is comprised in the present section.

Where there are numerous appointees (thirty-seven for in- Appointee- restance) they may be represented as defendants to a suit by some on behalf of all. Milbank v. Collier, 1 Coll. 237.

A bill may be maintained by a mortgagee on behalf of him. Creditors represented. self and all other creditors of a deceased mortgagor. Skey v. Bennett, 2 Y. & C. Ch. C. 405. In like manner the assignee of a specialty creditor may file a bill on behalf of himself and all other creditors for the execution of the trusts of an act of parliament providing for the payment of debts out of real estates. Batten v. Parfitt, 2 Y. & C. Ch. C. 343. And a bill to carry into execution the trusts of a deed of trust for the payment of joint and separate debts, may be filed by a separate creditor of one debtor, on behalf of himself and all other the joint and separate creditors, where it appears from the deed that they are very numerous, without making them personally parties, although they have all executed the deed. Weld v. Bonham,

Where trustees of an estate for the improvement of a town Inhabitants of a are empowered by act of parliament to levy a rate in case the ed. rents of such estate prove deficient for that purpose, an information and bill may be filed by some of the inhabitants on behalf of themselves and the others, against the trustees, for an account and for an injunction against the rate. v. Heelis, 2 S. & S. 67.

Again, where two members of a club have possessed them- Members of selves of property belonging to the club, and it is for the com- ed. mon interest of the club that this property should be brought within the control of the governing body; a bill may be filed by one member on behalf of himself and all others, except the defendants, for that purpose alone, without determining any thing respecting the distribution thereof when brought within the control of the governing body; but leaving it open to future litigation in that respect; and this will be the case, even where the club has been dissolved, but its affairs have not been wound up. Richardson v. Hastings, 7 Beav. 323. And where furniture belonging to a club is vested in a trustee, up-

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on trust to sell, and to repay the amount subscribed by certain members, parties to the deed, and borrowed of other persons, also parties to the deed, for the purchase of the furniture and to pay the surplus to the committee for the benefit of the club, a bill may be filed against certain members of the committee who have improperly sold the furniture and retained the proceeds, by one of the subscribing members on behalf of himself and all the other members of the club, other than the defendants, instead of making the parties to the deed or the other members of the club actual parties to the suit. Richardson v. Hastings, 7 Beav. 301.

Newspaper proprietors represented. But where twelve out of thirty-eight proprietors of a newspaper file a bill on behalf of themselves and all other proprietors, except the defendant, and it is not perfectly clear that the suit is for the benefit of all the proprietors, and the defendant insists, in his answer, that the other proprietors should be made parties, and alleges that the suit had been commenced without their sanction, and contrary to the wishes of several of them, the court will order the cause to stand over, with liberty to amend by adding parties. Bainbridge v. Burton, 2 Beav. 539.

Next of kin represented.

When the object of a suit is to determine the question of the right to a residue as between the next of kin as a class and a person claiming under a will, and not to distribute a residue, it is sufficient if some only of the next of kin are par-Caldecott v. Caldecott, Cr. & P. 183. And in cases where next of kin are very numerous, and the property is small, and the questions are such that no reasonable doubt can be entertained respecting them, the court will make a decree adversely to them, though but one of them, having the same interest as the rest, is a party to the suit. Bunnet v. Foster, 7 Beav. 540. And so where the next of kin and their representatives are numerous, and there are no representatives of some of them who have died, and the greater portion (fiveninths, for instance) of the interest of the next of kin is represented in the suit, the presence of the others will be dispensed with. Harvey v. Harvey, 4 Beav. 215.

Pew holders represented.

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Again, a bill may be filed by two persons on behalf of themselves and all other persons (except the defendants) who at the time of an alleged breach of the trust upon which a church is held, were, or at the time of the filing of the bill are, or are

entitled to be, holders of seats or pews in a church, or voters VII. PARTLES TO at the election of a minister, where the object of such bill is to Precine a vivide obtain relief in respect of such breach of trust. Milligan v. Interest. Mitchell, 3 My. & C. 72.

One of a numerous class of residuary legatees twenty-six Residuary legafor instance) will be also permitted to sue on behalf of him-ed. self and all others entitled as residuary legatees. Harvey v. Harvey, 4 Beav. 215.

So a bill may be filed, even during the existence of the part. Shareholders renership, by some of the shareholders of a numerous company, on behalf of themselves and the others, except the defendant, for the realization of their common assets, and for the application thereof to their legitimate purpose. Walworth v. Hott, 4 M. & C. 619.

Indeed, a bill may be filed by an individual shareholder in a numerous company, on behalf of himself and the majority of the shareholders, against the company and a certain number of the shareholders and directors thereof. Preston v. Guyon, 5 Jur. 146, V. C. E.

And one of the shareholders of a canal is entitled to file a bill, on behalf of himself and the other shareholders, against the commissioners appointed for putting into execution the Act under which the canal was made, to set aside an agreement entered into by them contrary to the provisions of the Act: for a bill to enforce the due exercise of the powers vested in the commissioners by the Act, and to avoid a breach of trust, must be intended to be in its nature beneficial to every shareholder. Gray v. Chaplin, 2 S. & S. 267.

So where a few of the partners in a numerous dissolved company have been appointed trustees to wind up its affairs, they may sue on behalf of the company to recover a debt. Gordon v. Pym, 3 Hare, 223.

And a bill to set aside a policy may be filed by the directors of an insurance company who signed the policy, on behalf of themselves and all other shareholders, without making the other members of the board of directors, by whom the affairs of the company are managed, parties to the bill. Barker v. Walters, 8 Beav. 92. And a bill may also be filed by the trustees who are also some of the directors of an insurance company, against the other directors, who are also shareholders

VII. Parties to of the company, and against the trustees of another company, PERSONS HAVING to set aside a policy effected by the latter with the first-mentioned company: and it is not necessary to make the other members of the respective companies parties, where they are very numerous, and where the bill states that their names and places of abode are unknown to the plaintiffs. Fenn v. Craig, 3 Y. & C. 216.

If a person files a bill against a railway company, it is sufficient to make the provisional committee and directors parties to the suit, if they all oppose the claim of the plaintiff in toto, and the plaintiff alleges that the number of the shareholders is so great, and the shares so fluctuating, that he cannot make them parties to the suit. Parsons v. Spooner, 15 Law J. 155, V. C. W.

And if the managing committee of a railway company, having monies in their hands applicable to the discharge of liabilities of the company, pay off the whole or a part of a debt, due from the company, and then the person to whom such debt is due brings an action, as a trustee for the company, against a shareholder for the amount of such debt, the court of chancery will restrain the creditor and the committee from prosecuting such action or any other action against such shareholder, and from disposing of the assets except in payment of the liabilities of the company; and the rest of the shareholders need not be parties, where the bill alleges that they are very numerous, and that their interests are identical with those of the committee. Lewis v. Billing, 10 Jur. 851, V. C. E.

Where a bill is filed by a few shareholders of a very numerous unincorporated company, on behalf of themselves and all other shareholders, except the defendants, seeking to be relieved from the payment of certain calls which are alleged to have been fraudulently made, but have been paid up by the other shareholders, and for an account and dissolution of the company, it is not sufficient to make the directors, trustees, and secretary, defendants; for they are bound to have an equal mind towards the plaintiffs as well as the other shareholders, and cannot properly be considered as representing an opposition. It is necessary that a sufficient number of the oher shareholders should be made defendants, in or-

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der to discuss the questions freely and unrestrainedly. Rich- VII. PARTIES TO ardson v. Larpent, 2 Y. & C. 507.

And a suit cannot be instituted against the committee by three of the partners in a numerous trading company alone, and not on behalf of themselves and the other partners, upon a point in which all the partners are materially interested; as, for example, for the liberty of inspecting the documents of the company, which might be prejudicial to the company, by disclosing its affairs to partners connected with a rival company. Baldwin v. Lawrence, 2 Sim. & Stu. 18.

Where a suit is instituted for the payment of a sum of money, in the nature of a debt, due to the whole body of the shareholders, of a company, the suit may be instituted by one of the shareholders on behalf of himself and all the other shareholders. And in such case, although the payment be claimed from the directors, who are made defendants for that purpose, it is correct not to except them out of the number of the shareholders on whose behalf the bill is expressed to be filed; because they are not sued as shareholders, but as directors; and, in their character of shareholders, they would be entitled to participate in the fruits of the suit. Mocatta v. Ingilby, 5 Law J. (N. S.) 145, M. R.

And in like manner where two or more shareholders in a numerous joint-stock company sue on behalf of themselves and all other shareholders, and one of the shareholders has acted as agent of the company, the plaintiffs may sue on his behalf in his character as shareholder, although they also make him a defendant in his character of agent. Taylor v. Salmon 4 My. & C. 134; Robinson v. Smith, 3 Paige's Ch. R. 333; Walker v. Deveraux, 4 Paige's Ch. R. 229.

The court will not restrain the registration of a deed of assignment of shares in a railway company, on a bill filed by a shareholder on behalf of himself and the other shareholders without the shareholders whose shares are assigned being made parties to the suit; for as the suit tends to prolong their liabilities, they ought to be parties. Greathead v. The London and South-Western Railway Company, 10 Jur. 343.

order to entitle a plaintiff to sue on behalf of himself and all representation. others who stand in the same relation with him to the subject

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VII. PARTIES To of the suit, it must appear that the relief sought by him is in its nature beneficial to all those whom he undertakes to represent." (Sir John Leach, in Gray v. Chaplin, 2 S. & S. 272.) But so long as the relief must be beneficial to all, it is not necessary that all should approve of the suit; on the contrary, in that case it would seem that in general it will not be a valid objection to a suit so constituted, even if the majority disapprove of the suit; for if all could not be personally made parties on account of their number, it would amount to a denial of justice to those who were desirous of suing, if the disapprobation of the others were an effectual obstacle to a suit on their behalf. And indeed it might open a door to a fraudulent connivance on the part of some parties interested and transactions which are injurious to the rest.

> Hence, where acts are necessarily injurious to the common interest of a large number of persons, a few of them may institute a suit for relief on behalf of themselves and the rest, although the majority approve of those acts, and disapprove of the institution of the suit. And in this case, as distinguished from the case of the whole body concurring in an abuse, the attorney-general need not be a party to the suit. Bromley v. Smith, 1 Sim. 8.

> Indeed a bill may be filed by a member of a numerous incorporated company, on behalf of himself and all other members of the company, except the defendants, to impeach a transaction, although it was the act of a unanimous meeting of the company, some of whom are not defendants, and are consequently included in the number of those on whose behalf the bill is filed. For the expression of suing on behalf of all the other members is merely a mode of expressing that the plaintiff sues in a general right. Preston v. The Grand Collier Dock Company, 11 Sim. 327.

> And where a bill is filed by some of the shareholders in a rejected and abandoned railway scheme, on behalf of themselves and all other shareholders, except the defendants, who were the provisional committee, and it alleges that the interests of the shareholders, except the defendants, were identical with those of the plaintiffs, and that none of them, except the defendants, had interests adverse to or differing from those of the plaintiffs, it is not demurrable for want of parties or for

misjoinder, although it prays for an account, and that certain VII. PARTIES TO SELIS APPRECIAGE expenses improperly incurred may be paid by the defendants, Persons HAVING and not out of the deposits, and that the surplus of the deposits, after payment of expenses properly incurred, may be ratably distributed among the subscribers; and although it states that the majority of the shareholders sanctioned the improper expenditure; and that some of the shareholders, whose names were unknown to the plaintiffs, had not paid any deposits. Apperley v. Page, 10 Jur. 998, V. C. B. But see Lund v. Blanshard, supra, pp. 400, 401.

3. Suits in which there is no statutory mode of suing or defending, but all persons having a community of interest need not be dispensed with made parties, either personally or by representation.—Some of the shareholders in a joint-stock company may file a bill for the re-payment of the deposits on their shares, on the ground of fraud, without making the other shareholders parties, if they allege that they are ignorant of the names of such other shareholders. Blain v. Agar, 2 Sim. 289.

Shareholders

And to a bill filed against a director of a banking company by a purchaser of shares allotted to that director, praying that the sale may be set aside on the ground of fraudulent representation made by the directors and their agents, the other partners were not necessary parties. Stainbank v. Fernley, 9 Sim. 556.

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And to a bill for the recovery of shares in a company, the owners of the other shares, if not interested in the shares sought to be recovered, are not proper parties. Turner v. Hill, Turner v. Tyacke, and Turner v. Borlase, 11 Sim. 1, 16, 17.

Where a lessee of a mine, after selling shares therein to several persons as a mining company, subsequently sells the entire interest therein to certain persons as trustees for a new mining company to be formed, he receiving part of the consideration in shares in such new company, and the sale is made by him without the knowledge of a person who is one of the shareholders in the original mining company, but afterwards accounting to all the others; that person may file a bill against him, without making the trustees, or the other shareholders in the original company, or the shareholders in the new company, parties to the suit, if the contest does not affect those individuals or the corpus of the property, but only the lessee

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VII. PARTIES TO and his particular interest; the shares being transferable by a delivery of the certificates, and the bill seeking a share of the profits and purchase money received by the defendant from the new company, or a transfer of a number of the shares therein belonging to the defendant equivalent to the amount of the plaintiff's interest in the original company. Mare v. Malachy, 1 My. & C. 559.

Person interested in profits dis-pensed with.

Where under an agreement a person is entitled to a share of the clear profits of a company, but the directors of the company are to have the exclusive management of its affairs, he is not a necessary party to a suit respecting dealings between the directors and a third party. For although he has an interest in the ultimate profits of the concern, he has no interest in any particular transactions, otherwise than as they affect the general account on which the ultimate profits are shown. Benson v. Hadfield, 5 Beav. 546.

Suit by trustees alone

A suit cannot be instituted by trustees of a company alone, and not on behalf of themselves and the other members for a specific performance of an agreement for a lease to them, although the agreement did not state that they were members of the company. Douglas v. Horsfall, 2 S. & S. 184.

Persons having a community of person. ally made parties 417

4. Suits in which all who belong to a companyor class must be personally made parties.—Some members of a numerous company or class may, as we have seen, institute a suit, on behalf of themselves and all other members, to have the accounts taken in which they are jointly interested.

In the case of a few creditors.

But twenty creditors is not so great a number that the inconvenience of making them parties should lead the court to allow the interests of all to be represented by some of them Harrison v. Stewardson, 2 Hare, 530.

Assignors of deposits on shares.

Again, the assignees of deposits on the shares in a joint stock company cannot sue on behalf of themselves and their assignors; but the latter, however numerous, must be parties to the suit. Blain v. Agar, 1 Sim. 37.

All the shareholders of a company, in a suit for a disso-lution or for winding up their affairs.

And where a bill is filed to have the company dissolved, even though its business may have ceased, or to have its affairs wound up, even though it had been previously dissolved; it is necessary that all the shareholders, if possible, should be personally made parties, however numerous they are, if their interests may be conflicted. Deeks v. Stanhope, 14 Sim. 57;

Harvey v. Bignold, S Beav. 343; Evans v. Stokes. 1 Keen, VIL PARTIES TO 24; Richardson v. Hastings. 7 Beav. 301. And hence where Person Having a bill is filed by a shareholder in a company, praying for an INTERIST account and payment of his share, all the other shareholders are necessary parties, because the bill in effect seeks a dissolution of the company. Abraham v. Hannay. 13 Sim. 581.

A suit cannot be instituted by some of the members of an insurance company, on behalf of themselves and the other members, for winding up the affairs of the company, although the members are so numerous that it would be utterly impossible to make them all personally parties to the suit. For the object of the suit is to deprive persons of a right who are not parties by cancelling their policies, which cannot be done in their absence. Long v. Yonge, 2 Sim. 369.

5. Suits by an incorporated company, by its corporate name. -Where a bill is filed by an incorporated company against the projectors of it to oblige them to account for the value of shares appropriated to themselves without having paid the full consideration, the individual shareholders are not necessary parties; for the transaction impeached is a transaction between the projectors and the corporation, and not a transaction between the projectors, as the owners of shares, and the persons who purchased from them. The Society for the Illustration of Practical Sciences v. Abbott, 2 Beav. 571.

VIII. PARTIES TO COPYRIGHT SUITS.

The author of a work is a necessary party to a suit by the publisher to restrain an invasion of the copyright, where no Author. actual assignment has been made of the copyright, but only an agreement to assign or dispose of it, and where, consequently, the legal title to the copyright remains in the author. Colburn v. Duncombe, 9 Sim. 151.

VIII. PARTIES TO

IX. PARTIES TO SUITS PERTAINING TO THE RELATION OF DEETOR AND CREDITOR.

to give effect to a charge on IX. Parties to Suits pertaining to the Relation of Debtor and Creditor.* (1)

- 1. Annuitant. See Legatee.
- 2. Assignee. See Debtor.
- 3. Bank of England.—In consequence of the statute 39 &

* See Sect. XIII. See note to p. 398.

(1) The meaning of the statutory provision as to judgment creditor bills in New-York, and which was merely declaratory of a principle previously established in chancery, is that the judgment creditor must make a bona fide attempt to collect the judgment debt on his execution. And when the judgment is against several, the remedy by execution against all, must be exhausted before bill filed; except, perhaps, where one of the defendants is a mere surety. But even in that case the fact of suretyship, and an averment that the suit here was instituted for the benefit of the surety and with his assent, should be stated in the bill. As the judgment creditor may take out several executions at the same time, the fact that defendants reside and have property in different counties, need not delay him in the commencement of proceedings here.

If the judgment debtor has a known and fixed residence in some county in the state and property there, and if the judgment is in a court whence execution may issue into such county, it must be done, and if not, the neglect will be a good defence to the bill. *Child* v. *Brace*, 4 Paige R. 315, 316; 309.

There are two classes of cases where a plaintiff is allowed to come into this court for relief. In the one the issues of the execution gives the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction, fraudulently or inequitably interposed to prevent a sale upon the execution. In the other to obtain satisfaction of his debt out of property of the defendant which cannot be reached by execution at law. Back v. Burdett, 1 Paige R. 308, (quoted by V. C. in Child v. Brace et al., 4 Paige, 310.)

Where the bill has a mere general allegation as to the value of defendant's property, and the result shows he had none, the bill will be dismissed with costs. Smets v. Williams, 4 Paige R. 364.

The judgment creditor may file a bill to remove a fraudulent or inequitable obstruction or embarrassment interposed to the lien of his judgment and satisfaction of his execution. But the bill must allege distinctly and specifically that there is land within the jurisdiction of the court of law where his judgment was obtained, and that it is a lien at law on the land, or if the property is personal, show execution issued in the county where the property is and a specific lien thereon by ac-

40 Geo. IV. c. 36, the Bank of England ought not to be a IX. Parties TO party to a suit for the purpose of giving effect to a charge up- ING TO THE REon stock. Perkins v. Bradley, 1 Hare, 219.

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tual or constructive levy of the sheriff, and that the relief sought, if granted, will be effectual, that is to enable him to pursue and obtain satisfaction by means of the legal rights and remedies he is already entitled to. Of course he need not show by return of execution unsatisfied, that he has exhausted his remedy, for that execution may be the very instrument of satisfaction after the court removes the impediment to its operation. And a judgment creditor may file a bill in respect to his lien on freehold estates without proceeding to execution, but not on leasehold and other personal property, for that exists only from the time execution is lodged in sheriff's hands, p. 567-8. (Cites 1 Atk. on Convey. 513.)

To entitle a judgment creditor to file a bill for the aid of creditor to obtain satisfaction out of property not liable to be levied upon by execution, he must show such execution returned unsatisfied. No state of facts will now excuse it, since the statute requires such issue and return. McElwain v. Willis et al., in error on affirmation of chancery decree. 9 Wend. 548, 564, 567, 568, 559. Senator Tracy, in his opinion on evidence of affirmance with which the court was unanimous, (idem. 565.) traces the creditors remedy, and says that equity aids not a creditor to a lien, for he trusts the debtor on his general credit, and equity secures equality of distribution, not restriction. Therefore, the mere fact of an assignment, fraudulent and collusive against creditors, does not in itself entitle a single creditor to seek relief. Perhaps a bill filed in behalf of himself and all the other creditors might be sustained, (18 Ves. 82; 2 Johns. Ch. R. 296, cited.) But the present is not such a bill. It is only after a creditor has obtained an execution at law, he acquires a legal preference to the assistance of Chancery, for none but execution creditors at law are so entitled. McDermutt v. Strong, 4 Johns. Ch. R. 691. It is where a creditor has obtained an advantage in legal diligence, and obtained judgment and execution unsatisfied that he may ask the aid of chancery. There seems two classes of cases of this kind:-1. Where the debtor has property on which judgment or execution is a specific lien, but which owing to fraudulent transfer, or some other embarrassment wrongfully created, cannot be made operative, p. 565, 567. 2. Where the property is removed before the lien obtained, or consists in choses of action or interest not liable to execution. In the latter class of cases there seems some doubt how far English chancery interferes to assist a judgment creditor; the existence of the bankrupt law in that country rendering such interference generally unnecessary, some early causes there show the exercise of the power, although Edghill v. Haywood, 3 Atk. often quoted in

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change.

4. Cestuis que trust.—To a supplemental bill for the repay-SUITS PERTAIN-ING TO THE RE- ment of a sum of money improperly recovered on a bill of exchange, the person for whom, according to the allegations of the original bill, the individual who recovered is a trustee, Costnique trust of is a necessary party, and that, notwithstanding the 32d orabill of exder of August, 1841. Pinkus v. Peters, 5 Beav 253.

> support of it, arose under peculiar circumstances, and later cases are the other way, p. 565. But in New-York the principle was established in chancery. Spader v. Davis, and Brinkerhoff v. Brown, 4 Johns Ch. R., and it was confirmed by court of errors. Hadden v. Spader, 20 Johns. R. 554.

> But it was settled by those cases that equity aid to enforce payment from people on which the judgment creditor had no lien, or from its nature could not have a specific lien, was not afforded until after execution unsatisfied. Whether actual return of execution had been required by the English courts, seems somewhat doubtful. The case of Manningham v. Bolingbroke, cited in Mitford Eq. Pl. 115, and in Cooper, 149, states, that though an execution be necessary, the return, of it nulla bona need not be shown; and in 3 Atk. 351, ante, the bill seems to have been filed as soon as execution was put into sheriff's hands. But here the cases were before the statute showed that such return was necessary, on the principle that the right to come here for relief, depended on the fact of the judgment creditor having exhausted his legal remedies, (4 Johns. Ch. R. 671; 2 McCord's Ch. R. 416; 1 Paige R. 308,) and these cases show that before the statute, the creditor, to enforce satisfaction from property on which he had no specific lien, must show in his bill that an execution on his judgment was returned unsatisfied. And the statute requiring that the execution "shall have been returned unsatisfied in whole or in part, to enable him to file his bill, is only declaratory of an existing rule. Consequently if the statute remedy be cumulative, the creditor, if relying on pre-existing power of the court, must still show execution returned unsatisfied.

> By a demurrer, a respondent admits the allegations of the bill, but he admits nothing more, for a demurrer confesses matter of fact only, not matter of law, 1 Lord Raym. 18. He does not admit inference's or deductions that do not follow necessarily from facts distinctly alleged, and whatever is necessary to entitle the plaintiff to relief, must be alleged positively and with precision. Mitford Eq. Pl., 41. See Senator Tracy, in McElwain v. Willis, 9 Wend. R. 568.

> A party seeking aid must show distinctly and unambiguously all the facts necessary to entitle him to that aid. Shepard v. Shepard, 6 Conn. R. 37, cited ibid. In ordinary cases where complainant has

Where an estate is devised to trustees, upon trust for the IX. PARTIES TO testator's widow for life, with power to sell the estate, if a ING TO THE REsale should be necessary for the payment of his debts; the case is one in which the court, under the concluding words of the 30th order of August, 1841, will order the widow to be Cestui que trust, in a creditor's made a party to a suit by a creditor. Hill v. Ledbrook, 6 Jur. suit. 1078. V. C. B.

a plain and adequate remedy at law, chancery will not interfere; for the jurisdiction it exercises as to legal demand is merely auxiliary to that of courts of law. It is in this character it sustains a bill of discovery to aid plaintiff in prosecution of his suit, or defendant in his defence, prevent setting up an inequitable defence as an outstanding term attendant upon the inheritance; and upon the same principle, after a judgment which is a lien upon land, the court will aid plaintiff by removing a fraudulent assignment, which is a cloud on the title and prevents the plaintiff from enforcing the lien of his judgment, or to redeem a mortgage which prevents the sale of the property, as where mortgagee is in possession, or the amount due on the mortgage not being ascertained it prevents a fair sale upon the judgment. But in cases of this kind the complainant must show distinctly in his bill that the land is within the jurisdiction of the court of law where his judgment was obtained, and that it is a lien at law on the land. The like principle is applied to personal property, and as lien on that is not by judgment, plaintiff must show execution issued where the property is and a specific lien by levy. As in both cases the aid is sought to enforce a lien, it must appear by bill that the lien exists. Idem, 568, 9.

The owners of a short term of years in land, although they may have the right to file a bill to prevent the commission of future waste, might not be the proper persons to claim componsation for that already committed. Hawley et al. v. Wolverton, 5 Paige R. 524, 522.

It is unnecessary to make an insolvent judgment debtor party in judgment creditor's bill for satisfaction of the joint debt out of the equitable interest, property and choses of the other joint debtor's defendants, proyided it distinctly appear in the bill. If he is wholly destitute of property the fact should be distinctly averred in the bill, positively or on information and belief, so that defendant may take issue thereon if he please, in his plea or answer, and if complainant cannot make such averment and sustain it by defendant's answer or proof, he should make the other joint debtor party, if in the jurisdiction of the court. If it do not so appear, or a sufficient excuse be shown for not making him party, the other debtor may demur for want of parties. All the judgment debters may be parties, if either or all collectively have to exDEBTOR AND CREDITOR.

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5. Creditors.—A creditor by mortgage and collateral bond SUITS PERTAIN.

3. Creations.—A creditor by mortgage and collateral bond into TO THE RE- cannot sue both as mortgagee and as bond creditor. And a LATION OF bond creditor cannot sue alone: he must sue on behalf of himself and all other bond creditors. White v. Hillacre, 3 Y. Bond creditors, & C. Eq. Ex. 597.

in a suit by one.

ceed \$100, which could not be reached by execution at law; and one of them who is entirely destitute of property will not be entitled tosts, unless he was unnecessarily compelled to answer, instead of taking the bill as confessed against him. If one of the judgment debtors had not been served with process in the suit at law, so that a decree here could not reach his separate property, it may still be proper to make him a party to the creditor's bill, so as the other defendants may claim contribution against him, if they are compelled to pay the whole debt. Cleef v. Sickles, 5 Paige R. 506-8, 505.

On a bill against directors of an independent New-Jersey bank, filed by a judgment creditor on judgment had in New-Jersey to reach property fraudulently converted by the directors, and alleging that said bank had not property in New-Jersey or here, whereby the judgment recovered against the bank, and certain of its directors, could be satisfied, it was held on demurrer, that the judgment, as appeared by the bill itself, was unauthorized by the New-Jersey statute, the requirements of which had not been followed in the service of process on some of the individual directors against whom the judgment had been rendered, and which as to them was absolutely void. Cunningham v. Pell et al., 5 Paige C. R. 610-13, 607.

Apart from the defective form of the bill, complainant would be entitled to relief on the ground that the directors of a corporation are liable to the parties injured for a fraudulent breach of trust. A joint creditor on judgment against the corporation, or even a creditor at large, is entitled to protection against fraudulent acts depriving him of the means of collecting his debt in the usual way against the corporation itself. It is not necessary to make all the fraudulent directors parties to a bill for satisfaction for a fraudulent breach of trust. This is an exception to the general rule, that in a proceeding against trustees; all must be made parties. If complainant seeks to change any of the directors on ground of personal liability for the debts of the company, pursuant to the act of incorporation, all the other directors liable to the same extent, should be made parties so that a proper decree for contribution may be made. In that case the corporation also, if in existence and not entirely destitute of property, should also be a party, so that its funds may be fairly applied to the payment of complainant's demand.

When, as in the above case, the personal representatives of one of

To a bill filed for carrying the trusts of a creditors' deed IX. Parties to Suits Pertainstant execution, the scheduled creditors who have not executing to the Reted the deed need not be parties. Prosser v. Edmonds, 1 Y. Debtor and Creditor. & C. 481. And creditors whose names are scheduled in a creditors' deed, but are not parties thereto, are not necessary scheduled creditors. parties to a suit by a subsequent incumbrance, to have the monies, out of which it was intended to pay such creditors,

the directors, were joined in the bill with the trustees under a marriage settlement of such director, the bill was not objectionable for multifariousness, the first that the account for the moneys, &c. of the bank fraudulently abstracted by their testator, and the last that they may be compelled to restore the funds of the bank that came into their hands as trustees under such marriage settlement. But the corporation must also be a party, whether the suit be by creditors or stockholders, the principle is the same. If creditor could compel account for abstracted funds, the corporation not a party, might after compel account. Though the corporation is in another state, it may be proceeded against as an absent defendan t.

If there are other creditors than complainant, they also should be parties or the bill should be filed by complainant in behalf of himself, and all others standing in the same situation, to enable them to come in under the decree, and to relieve defendants from the necessity of accounting again to other creditors.

Where the judgment was joint on a joint debt and some of the defendants were served with process, still the bill must be filed against all, unless it aver that those not served, were mere sureties, or not legally or equitably hable to contribute towards the debt, or insolvent, or out of the jurisdiction. Commercial Bank of Lake Erie v. Meach, 7 Paige R. 448; see further creditors' bill against joint debtor, Austin v. Figueira, id. 56; Commercial Bank of Lake Erie v. Meach, id. 448.

Judgment creditor's bill, whether it lies against lunatic, was a question suggested in Copous v. Kauffman et al., 8 Paige R. 588, 583, and the chancellor was not prepared, he said, to say that a bill might not be framed so as to reach property of a lunatic, which is actually under control of his wife, so that complainant otherwise would be entirely without remedy, unless he could obtain decree against him for the delivery of the property.

Plea in bar to judgment creditor's bill, is good that defendant had property which might have been levied on, but was not by the officer who had the execution by consequence of collusion between them and complainant in procuring execution to be returned unsatisfied. Thorn v. Badger et al., 8 Paige, 130.

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IX. PARTIES TO raised; at least where they are very numerous, and the trustees of the deed are parties to the suit. Powell v. Wright, 7 Beav. 444. But in a case where a bill is filed by a creditor against a debtor and the trustees for certain of his creditors named in a schedule, and it prays payment of the plaintiff's debt out of the estate vested in the trustees; or out of the proceeds after payment of the debts of the scheduled creditors; and that an account may be taken of the trust estates and of the receipts and payments of the trustees; all the scheduled creditors are necessary parties. Cocker v. Lord Egmont, 6 Sim. 311.

Other creditors.

An official assignee may recover from the representatives of a former assignee, monies in his hands consisting of dividends declared but unclaimed, without making any creditor party to the suit; for the order for a dividend is not an appropriation of any particular part of the bankrupt's estate to any particular creditor, but an order to pay a proportion of the debts out of the bankrupt's estate. Green v. Weston, 7 Law J. (N. S.) 67, L. C.

Author of a trust for pay-ment of debts.

6. Debtors and their sureties and personal representatives and assignees.—To a suit for the execution of a trust to sell and to pay scheduled creditors out of the proceeds of sale, and to pay over the surplus to the author of the trust, he is a necessary party, (Bedford v. Gates, 4 Y. & C. Eq. 21,) notwith-

All the judgment debtors it seems must be parties, but the objection should be by demurrer or inserted in answer of the defendants. If not, it affords no sufficient ground for dismissing bill at the hearing. The only effect of an objection at the hearing would be to order the cause to stand over with liberty to complainant to file a supplementa bill to bring the necessary parties before the court. Child v. Brace et al., 4 Paige R. 314, 309.

All the co-judgment debtors, defendants in the suit below, should be made parties to the bill; but if the objection be not raised by demurrer, or insisted on in the answer, it affords no sufficient ground to dismiss the bill at the hearing. Child v. Brace et al., 4 Paige 314, 309.

A judgment against a foreign corporation, upon an attachment under New-York Revised Statutes, is a proceeding in rem, and not such a judgment as on which a creditor's bill lies on return of execution un. satisfied. The execution goes against that property only. Thomas et al. v. The Mechanics' Bank, 9 Paige, 218, 216.

standing the 40th order, although the defendants say that the IX. PARTIES TO trust fund is insufficient for the payment of the creditors, and ING TO THE REtherefore there will be no surplus for the author of the trust. For if the trust fund should be distributed under the decree of the court, in the absence of the author of the trust, he or his representatives might in another suit obtain a degree against the trustees for an account, and the effect of the former decree might be to give him or them the personal security of the trustees, in substitution for the security of a fund in court. Kimber v.-Ensworth, 1 Hare, 293.

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By the 32nd order of Aug. 1841, " In all cases in which the Persons against plaintiff has a joint and several demand against several per- joint demand. sons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."

This order does not apply to cases where there is only one principal and one surety. Where several persons are liable in different characters, some as principals, and the rest as sureties, then the order applies in such a way as to render it sufficient to make one individual of each class a party. Lloyd v. Smith, 13 Sim. 457.

To a suit by a surety against the obligee of a bond, for the cancelling of a bond, and for an account of monies received Principal and coin respect thereof, the principal and co-surety are necessary by a surety for parties. Allan v. Houlden, 6 Beav. 148. And to a suit against a bond and an trustees, seeking to set aside, on the ground of fraud, a bond combier in a of indemnity, and a release to them executed by their cestui bond, in assit to . que trust, a co-obligor in the bond, who was their solicitor, is a necessary party. Colby v. Hawkins, 6 Jur. 162, V. C. B. And to a bill praying payment of a debt by a surety, the prin- Principal debtor cipal debtor, in respect of a possible liability to contribute in a suit against the surety. something to the surety, is a necessary party although the bill states that he had been released by the plaintiff, with the consent of the surety. Brooks v. Stuart, 1 Beav. 512. And in Personal reprelike manner, in a suit by an obligee of a bond, it is necessary principal conditions that a personal representative of one of the region is a like or massifily that a personal representative of one of the principal obligors an obligoe. should be before the court, even where the bill states that let. ters of administration of his estate have not been taken out, and that there are no assets out of which any part of the plain-

the cancelling of

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insolvent debtor

IX. PARTIES TO tiff's demand can be satisfied. Musgrave v. Vick, 5 Law J. ING TO THE RE- (O. S.) 150, V. C.

The assignee of an insolvent debtor is a necessary party to a bill by the insolvent for the delivering up of a bill of ex-Assignee of an change drawn by him prior to his insolvency, because it is in a suit by the primá facie the property of the assignee. Balls v. Strut, 1 Assignees of an Hare, 146. But where an insolvent vendor, and another perinsolvent vendor, in a suit to son, as his surety, join in a promissory note for the repayment tion against his of a part of the purchase money in case a good title cannot be made, and where the surety files a bill to restrain an action on the note, the assignees of the vendor are not necessary parties, if the title is found good, or objections to it have been waived or could be properly compensated. Musgrave v. Newton, 4 Law J. (N. S.) 223, V. C. and Lord Commissioner Pepys.

7. Drawer of a bill of exchange.—The drawer of an accommodation bill is a necessary party to a suit by the acceptor against the holder to have the bill delivered up to be cancelled. Penfold v. Nunn, 5 Sim. 405.

But the drawer of a bill of exchange, who has indorsed it over for value, is not a necessary party to a suit by the acceptor against the drawer's indorsee, for relief against a fraudulent indorsement by such indorsee, after payment of the bill by the acceptor. Earle v. Holt, 9 Jur. 773, V. C. W.

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al representator's suit.

Heir in a suit under 3 and 4 will. IV. c. 104. Party to a suit under the stat. 3 & 4 Will. IV. c. 104, for the 8. Heir.—The heir of a deceased debtor is a necessary payment of his debts, by a sale of real estate devised by him. Brown v. Weatherby, 10 Sim. 125; overruling Weeks v. Evans, Heir and person. 7 Sim. 546. And where a testator directs his debts to be tive, in a credi- paid out of his personal estate, and the deficiency to be made up out of his real estate, and the executors will not prove, because there is no personal estate; in such case, if a creditor's bill is filed, administration and cum testamento annexo must be taken out, and the administrator and heir at law, though an infant, must be parties. Fordham v. Rolfe, Talm. 1.

Heir and devisee of real estate in India.

By the stat. 9 Geo. IV. c. 33, s. 1, the real estate of British subjects in India is assets in the hands of executors for the payment of debts; and hence the devisee and heir at law of a debtor in India are not proper parties to a creditors' suit.

Story v. Fry, 1 Y. & C. Ch. Ca. 603; 11 Law J. (N. S.) IX. PARTIES TO 373, V. C. B.

9. Indorsec.—To a suit by the last indorsee of a lost bill of exchange, to recover the amount from the acceptor, the prior indersees need not be made parties. Macartney v. Gra- Prior indersees ham. 2 Sim. 285.

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10. Legatees.—Where a person dies seised of real estate indursee. which was devised to him charged with annuities and lega- nuitants when cies, the annuitants and legatees ought not to be parties to a brances. suit for payment of his debts out of such real estate; because they are merely persons having incumbrances prior to his interest. Parker v. Fuller, 1 Russ. & My. 656.

11. Partners.—Where an executor is a partner in a firm Partners of an who claim to be entitled to retain assets in their hands in sat-suit by a creditor. isfaction of a debt which they allege to be due to them from the testator, a creditor of the testator may sue all the partners, where he charges that they all claim to retain the assets, because that amounts to collusion between the executor and the other partners, as it shows that they are all acting in concert. Gedge v. Traill, 1 Russ. & My. 281.

12. Sureties.—When a bill is filed by a person claiming an Sureties named annuity, against a person who has covenanted to pay it, and pay an annuity to create a term in certain estates for securing the same, and against a person who has obtained a decree in another suit, on behalf of himself and other creditors named in a creditor's deed whereby the estates were vested in trustees for the creditors who should execute the deed, and against such trustees, praying for an account, and a declaration of the priorities of himself and the other incumbrancers, and a redemption of such as were prior to his own, and liberty to go in under the decree for what he should not be entitled to recover in priority to the trust deed; all the creditors, though numerous (for instance thirty), that have executed the deed, are necessary parties; but persons who have joined as sureties in the covenant to pay the annuity are not necessary parties. Newton v. Earl of Egmont, 4 Sim. 574; 5 Sim. 130.

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Nor is a creditor, in enforcing a subsequent security, oblig. Surety made and ed to make a person who executed a prior bond, as surety, a party to the bill. Adams v. Thompson, 6 Law J. (N. S.) 109, M. R.

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FRAUD Assignee of a bankrupt who committed a fraud.

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Limited administrator, in a suit charging a ceased execua loss.

Where, through the negligence of a solicitor, a person is enabled to commit and does commit a fraud, and afterwards becomes bankrupt, his assignee is a necessary party to a suit against the solicitor. Greenwood v. Atkinson, 4 Sim. 419.

The estate of a deceased executor is sufficiently represented in a suit by an administrator appointed to attend, supply, tor's estate with substantiate and confirm the proceedings, where the object of the suit is only to charge such executor's estate with a loss occasioned by him. Ellice v. Goodson, 2 Coll. Ch. 4.

Representative of an insolvent who joined in a fraud.

Representatives of a deceased coexecutor.

The representatives of a person who joined in a fraud, but died insolvent, without leaving any assets, is not a necessary party. Seddon v. Connell, 10 Sim. 79.

To a suit seeking to affect the personal assets of a testator, the representatives of one of his executors who possessed part of his assets and died before answer, are necessary par-Brydges v. Branfil, 11 Law J. (N. S.) 249, V. C. E.

Representative of a mortgagor, in a suit to set aside a volunta-ry settlement.

The personal representative of a mortgagor is not a necessary party to a suit by an equitable mortgagee to set aside a prior voluntary settlement of the property comprised in his Bostock v. Shaw, 15 Law J. (N. S.) 257, V. C. E. mortgage.

devisor of a lease To a suit against the devisee of a lease, to set it aside, the lease, in a suit to executors of the testator, who have assented to the devise, are not necessary parties in respect of a sum alleged to be due from the plaintiffs in respect of money expended by the devisor in improvements. Malpas v. Ackland, 3 Russ. 273.

Heir, in a suit to set aside a fraudulent convey-

set it aside.

Where a fraudulent conveyance has been obtained, a bill may be filed by the devisee of the grantor to set aside the conveyance, without making his heir at law a party. Uppington v. Bullen, 2 Drury & War. 184.

Solicitor in a suit to rectify a deed fraudulently altered. 423

In order that he may make a discovery and may be made liable for the costs, a solicitor who has fraudulently altered a draft may be made a party to a suit instituted for the purpose of rectifying the deed. Beadles v. Burch, 10 Sim. 332; 9 Law J. (N. S.) 57.

⁽¹⁾ A bill to set aside conveyance to trustees for fraud need not make cestuis que trust parties defendant. The interests of all may be bound by the decree without such parties. Campbell et al v. Watson et al. 8 Ohio R. 500, 493.

XI. PARTIES TO SUITS PERTAINING TO THE RELATION OF XI. PARTIES TO HUSBAND AND WIFE. (1)

The husband of a deceased woman is not a necessary party to a suit instituted in respect of her chose in action, by Husbani persons who have taken out administration to her with the consent and as the nominees of the husband, Collins v. Collins, 6 Jur. 49, V. C. E.

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(1) In Massachusetts where an action to foreclose is statutory, on foreclosing a mortgage given by husband and wife of realty in her own right, she was properly joined as party defendant. Swan v. Wiswall, 15 Pick. R. 126.

When an unmarried woman should be party to a bill but is not, and pending it marries, her husband must be party and they should be made such not by amendment but supplemental bill. But if she had been served with process and then marry, the suit does not abate, nor is it necessary to file such bill to bring her husband before the court. It is only necessary in such case to make a suggestion of the marriage and obtain an order that husband and wife be named as parties in subsequent proceedings. (Mitford, 58.) The supplemental bill in the former case, which was for foreclosure of several mortgages on bills filed by executors of an executor of mortgagee and testator, must state, by way of amendment, the interests of all such parties as should have been made defendants to the original bill, and by way of supplement may state such new interests as have occurred by marriage or otherwise, and may thus bring all the necessary parties who are interested in the premises before the court. The original bill may also be annexed by striking out the names of all defendants who had no interest in the premises when it was filed, together with the allegations as to their interests. The suit is not abated or this amendment could not now be allowed. The coming of age of an infant defendant or complainant does not abate the suit, nor does it render a supplemental bill necessary, unless his interest in the subject is changed by that event, nor does the suit abate technically by the operation of the 2d Revised Statutes, 448, that executor of executor has no authority to bring suit relative to estate of testator. Campbell et al. Executors, v. Bowne et al. 5 Paige 36, 34. This case came up on a petition to revive, and for leave to file a supplemental bill and to amend the original bill, by striking out some and adding other parties rendered necessary by death or marriage, and upon arrival at age of infants, &c. The court decided that the suit continue in name of petitioner as the person who succeeded to the rights of the executors of the acting executors in the prosecution of the suit. But as it is necessary for petitioner to file an

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Where a feme covert is a necessary party, her husband must SUITS PERTAINING TO THE RE- also be a party, although she has lived and still lives apart HUSBAND AND from him, and although he has had nothing to do with the transaction in respect of which she is made a party. na v. Everitt, 1 Beav. 134.

> Where a testator makes the wife of another man his executrix, supposing her to be his (the testator's) own lawful wife, and she afterwards marries a third person in the lifetime of her real husband, and such third person possesses part of the assets; her real husband is a necessary party to a bill against her by the next of kin, but he cannot insist on their making such third person a party, although they might follow the assets into his hands if they chose. M. Kenna v. Everitt, 1 Beav. 134.

Wife, a defendant to a bill by her husband.

Where a bill is filed to give effect to a deed whereby a mar-

original bill in the nature of a supplemental bill, for the purpose of bringing some new parties before the court as defendants, the proper course is that he file the bill in his character of administrator de bonis non, to have the benefit of the former proceedings in the suit, and in the same bill to set out the necessary facts either as amendatory or as supplemental matters to bring in all now having interest in the premises. In such bill he may make the whole proceeding rectus in curia without amendment of original, stating the mistakes as to parties in the original, change of interest of other parties by lapse of time or otherwise, as reasons for not making persons parties to the supplemental . bill who never had any interest in the subject of the suit, or whose interest no longer exists. Such bill will be in the nature of an original as to those who should have been parties in the first place; and will be a supplemental bill as to those who were served with process in the original, or who subsequently derived title through or under them. The rights of the new parties would be the same upon amendment of the first bill, as the court cannot by amendment deprive those made parties by such amendment of any defence they had under the statute of limitations or otherwise, when they were actually made parties to the suit. Ibid. 37, 38.

A petition for partition is an adversary suit, and where there can be no adversary a partition would be unavailing, as when the petition was by husband and wife for partition of real estate devised to her, one third in fee and residue for her life, remainder to her issue, and if she die without, then over to certain persons named. There were no adversary between plaintiffs and those having the contingent remainder. Hodgkinson et ux. Petitioners, &c., 12 Pick. 374.

ried woman assigns her separate property in favour of her XI. PARTUS TO husband, she ought not to be a co-plaintiff with her husband, ING TO THE A. but she ought to be a defendant, in order that she may admit by her answer that the deed was fairly obtained, and was executed by her with a full knowledge of her rights in the property assigned. Hanrot v. Cadwallader, 2 Russ. & My. 545.

For other cases relating to this title, see supra, n. p. 30.

XII. PARTIES TO SUITS FOR LEGACIES. (2)

To a bill for raising legacies charged on real estate, annui- Annuitants, in a tants who have a priority over the legacies, are necessary legacies out of parties. Garrett v. Hayter, 9 Law J. (O. S.) 197, M. R.

Where an executor hands over property to the residuary Personal representatives of the legatee, without setting apart a sufficient sum to answer a testator. particular legacy, for which a bond is given by the residuary legatee, and the executor states to the particular legatee that the amount of such legacy is less than it really is, the particular legatee may maintain a suit for the difference against the residuary legatee and the representatives of the executor personally, without making the representatives of the testator parties to the suit. Beasley v. Kenyon, 3 Beav. 544. See also Hudson v. Twining, Taml. 315.

A person to whom a legatee of stock has bequeathed the same may file a bill against the trustees of the stock, for a transfer thereof, without making the executors, either of the original testator or of his legatee, parties to the suit, where the bill alleges that they have respectively assented to the bequests of the stock by their respective testators. Brooksbank, 3 Law J. (N. S.) 226, V. C.

XIII. PARTIES TO SUITS PERTAINING TO THE RELATION OF XIII. PARTIES TO MORTGAGOR AND MORTGAGEE. (1)

1. Mortgagors and their representatives and assignees .- The mortgagor or his heir is a necessary party to a bill by a second

XII. PARTIFS TO SUITS FOR LEGA-

real estate.

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SUITS FERTAINS GAGO AND

mort_a ce to redeem and loreclose.

⁽¹⁾ See n. to p. 398.

⁽²⁾ It is a general rule that besides the parties to a mortgage those only are proper parties to a suit for the foreclosure thereof who have, sub-

MORTGAGEE.

XIII. PARTIES TO mortgagee to redeem the first mortgage and foreclose the SUITS PERTAIN. MOREGAGE TO TOUGHT. And the court will not make a decree in his absence, although he be out of the jurisdiction, and his residence unknown. Farmer v. Curtis. 2 Sim. 466.

> sequent to the date of the mortgage, acquired rights or interests under the mortgagor or mortgagee. Per Harris, J., Holcomb v. Holcomb, 2 Barb. Sup. C. R. 20. The plaintiff may also make prior incumbrancers parties to the bill, for the purpose of having the amount of such incumbrances liquidated and paid out of the proceeds of the sale; or he may at his election, have the premises sold subject to such prior incumbrances. Per Harris, J. Ibid.

> A mortgagee, in filing a bill of foreclosure, has no right to make a person who claims adversely to the title of mortgagor, and prior to the mortgage a defendant in the suit, for the purpose of contesting the validity of such adverse claim of title. Ibid.

> Though in general executor may properly be made party to a bill for enforcing mortgage against heir, yet if brought against heir alone, and he did not raise the objection, the court would not refuse to decree on account of want of parties, and if heir thought proper to admit the claim, executor would not be permitted to volunteer for the purpose of defending it. Cruger v. Daniel, 1 McMullen Eq. Cas. S. Caro. 188, 9, 157.

> Mortgagee of personalty need not make mortgagor party to bill against underwriters to recover on policy insuring the property mortgaged on account of whoever it concerns. The mortgagee is the owner after the condition is forfeited. In this there is a difference between a mortgage of real and personal property. Rogers et al. v. The Traders' Insurance Co. et al., 6 Paige R. 586, 7, 594, 583.

> On death of mortgagee the fee technically descends to the heir, but he is a bare trustee for the personal representatives. The mortgage interest before foreclosure is a chattel interest. It is personal assets and goes to executor who may assign it. It is not necessary that the heir should. The executor before assignment, or assignee after, may foreclose, and as a general rule the heir need not be a party to bill filed by the executor for that purpose. It is a proceeding by the personal representative for recovery of the debt, and the premises are under his control, so far as to make the money. There are some English cases which appear to hold the principle that the heir is a necessary party to a bill of foreclosure filed by the executor. One of them is the late case of Scott v. Nicoll, 3 Russ., 476, but the reason assigned is, that if mortgagor redeem there will be no one before the court from whom a conveyance of the legal estate can be taken shows that it is appli-

A mortgagor who has taken the benefit of the Insolvent XIII. PARTIES TO Act ought not to be made a party to a suit for foreclosing the ING TO THE REmortgage. Collins v. Shirley, 1 Russ. & My. 633.

cable only to cases of strict foreclosure, not of foreclosure and sale un- Insolvent mortder our laws and practice. Kinna v. Smith. 2 Green's Ch. R. 16, 17, 15.

A mortgagee who has assigned without seal and in whom the legal title remains, is not a necessary party to bill by assignee. Parker v. Stevens, id. 56.

Foreclosure is a proceeding in rem, not a personal action, and defendant cannot set off a demand, nothing but payment operates as a release of the incumbrance pro tanto. White's Administrators v. Williams, 2 Green's Ch. R. (N. J.) 376.

A statute foreclosure as to the rights of a subsequent mortgagee to redeem is wholly inoperative. The effect of such foreclosure is merely to transfer to the purchaser the right of mortgagee to the extent of his claim or interest in the premises for the security of his debt, and so much of the equity of redemption as was not bound by the lien of a junior mortgage or judgments. The purchaser is only entitled to the amount due on the mortgage, and the subsequent incumbrancer coming to redeem is exempt from the costs of the statute foreclosure which as to his rights was wholly inoperative. Vroom v. Ditmas et al., 4 Paige R. 531, 526.

But he obtains the whole legal and equitable interest of mortgagor and all claimants under him, subject to the equitable right of the judgment creditors to redeem, by paying the whole mortgage debt without costs of the statute foreclosure, but paying the costs of the bill to redeem, and also for improvements made by the purchaser under an admitted ignorance of the existence of such incumbrances. Benedict v. Gilman, 4 Paige R. 61, 62, 58.

A purchaser under a statute foreclosure may file bill against a judgment creditor or subsequent mortgagee, to foreclose their equity of redemption and need not make mortgagor, or any other whose equitable claim is already barred, a party. In such suit the subsequent incumbrancer is entitled to redeem upon the usual terms of paying amount due upon the mortgage and the costs of the suit, unless the complainant has an equitable claim as in this case, to a further allowance for improvements, &c. In such cases the court may order a release of the premises under the direction of a master, or may decree a strict foreclosure against the subsequent incumbrancer if he neglect to redeem, as will best promote the ends of justice. Ibid 62-3, 58.

The owner of the equity of redemption is a necessary party although the mortgagor is still liable on his bond for the deficiency, and if mortgagor has assigned it, the grantor must be made a party also, for XIII. PARTIES TO SUITS PERTAIN LATION OF MORT-GAGOR AND MORTGAGEE.

Bankrupt mortgagor in a suit for sale.

So a mortgagor who has become bankrupt is not a neces-ING TO THE RE- sary party to a suit for a sale of the mortgaged estate, as the whole of his property, and consequently his right to redeem, is vested in his assignees. Kerrick v. Saffery, 7 Sim. 317.

> otherwise the master's deed would convey no title to the purchaser as against such owner, and if not, and it so appear on the bill, defendant may demur, or the objection for the nonjoinder of the grantee may be taken in the answer.

> Before the Legislative act of May, 1840, (New-Yerk,) which allows a judgment creditor who was not a party, or any one claiming any right or equity of redemption under a judgment to apply to be made a party, (the object of which statute was to protect creditors by judgment or decree subs quent to the mortgagee and claimants under them, who must have been parties prior to that act in order to bar their rights of redemption,) before that act purchasers, pendente lite from a defendant in the suit after the filing notice of lis pendens, and creditors by judgment or decree against such defendant who had obtained their liens on the mortgaged premises pending the foreclosure were bound by the decree though not actual parties, and if they wished to interpose a defence they could only do it in name of defendant, or if he colluded with complainant or refused to permit those who acquired interests under him after suit brought, to be made a proper defence in his name, their only remedy was to make themselves parties by filing a bill to protect their rights. Peoples' Bank v. Hamilton Manufacturing Co., 10 Paige Ch. R. 484, 481; Mitford's Pl. 73.

> A judgment creditor of mortgagor who seeks to be made party and applies after decree for leave to come in and defend under the act of 1840, must show upon oath that he has a defence, and state what the defence is, and if it is on information, the affidavit of the informant must be annexed. Ibid.

> On bill to foreclose a mortgage, the mortgagee cannot make a prior claimant of the legal title adverse to both mortgagor and mortgagee party, to test and settle by decree the validity of his title. Nor in bill for specific performance can vendee make claimant of title adverse to vendor, party for like purpose. So far as mere legal rights are concerned upon bill of foreclosure, the only proper parties are mortgagor and mortgagee and those who have acquired rights or interests under them subsequent to the mortgage. Eagle Fire Co. v. Lent, 6 Paige, 637-8, 635.

> On bill for specific performance, and on report of trustee on title, the court held that where there is a contest in chancery in relation to real estate, or where mortgagee seeks foreclosure, and there are several

Nor is the assignee of an insolvent mortgagor a necessary NIII. Parties to party to a foreclosure suit. Steele v. Maunder, 1 Coll. 535.

To a bill to redeem which alleges that the mortgagee has been over-paid, the personal representative of the mortgagor is a necessary party. Baker v. Weston or Wetton, 9 Jur. 98, V. C. E.

The surviving partners of a firm, one of whom deposited title deeds with the firm as a security for money borrowed by mortagor in a him and by another person, cannot file their bill against his Personal heir for a sale of the estate to which the title deeds relate, mortgagor. without making his personal representative a party: for if the heir suggests that the debt has been satisfied (which, in the given case, it might be by a balance, being left in the hands of the partners sufficient to pay the debt), that must be investigated; and it cannot be investigated in the absence of the personal representative. Scholefield v. Heafield, 7 Sim. 667.

2. Mortgagees and their representatives. - Where the trustees

GAGOR AND

Other mortgagees of tolls in suit by one mortgagee.

future and contingent interests in the equity of redemption, it is not necessary to make every person having or claiming such interest, party, in order to bar his right or claim by decree. It is sufficient if the person who has the first vested estate of inheritance, and all other persons having or claiming prior rights or interests in the premises, are brought before the court. The person having the first estate of inheritance, and who is in esse, appears a necessary party to a bill of foreclosure to make the decree a bar either to his right or to the right of any contingent remainderman, who is not made a party to the suit to make the foreclosure valid against all claimants, not only he who has the first estate of inheritance must be brought before the court, but even the intermediate remaindermen, for life, ought to be brought before the court to give them an opportunity to pay off the mor gage if they thought fit. Nodine v. Greenfield et al., 7 Paige R. 548, 544.

Where mortgagee in possession gives an absolute lease reserving rent, he or his assigns must be parties to a bill for redemption against lessee, so that lessee may be discharged from his covenants for payment of rent, and also have a decree for his proportion of the redemption money, to the extent of the value of his term over and above the rent reserved. Dias v. Merle, 4 Paige R. 259.

On a bill filed by the assignees of a tenant for life for a partition, the creditors of the tenant for life are not necessary parties. Van Arsdale v. Drake, 2 Barbour's S. C. Rep. 599.

SUITS PERTAIN-ING TO THE RE-LATION OF MORT GAGOR AND MORTGAGEF

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Heir of a mortgagee in a foreclosure suit.

XIII. PARTIES TO of a turnpike road assign to a mortgagee such proportion of the tolls as the sum advanced by him bears to the whole principal money advanced on the credit of the tolls, the other mortgagees of the tolls are necessary parties to a suit by him against the trustees to obtain payment of arrears of interest Mellish v. Brooks, 3 Beav. 22. out of the tolls.

"The heir of a mortgagee to whom the legal estate in the mortgaged premises has descended, is a necessary party to a . bill of foreclosure filed by the executor of the mortgagee." Scott v. Nicholl, and Hampson v. Nicholl, 3 Russ. 476.

Representatives of deceased mortgagees.

Where a mortgage was made to several persons jointly, whether as trustees or not, the representatives of such of them as are dead are necessary parties to a bill for foreclosure of redemption; because, although at law the whole debt and security vests in the survivor, yet in equity the mortgagees are tenants in common. Vickers v. Cowell, 1 Beav. 529.

First mortgagee it a suit by a se-

Prior incumbrancers, in a suit by a ment cred tor.

A second mortgagee may sustain a bill of foreclosure against the mortgagor and the subsequent mortgagees, without making the first mortgagee a party. Richards v. Cooper, 5 Beav. 304; Rose v. Page, 2 Sim. 471.

Where a receiver appointed in a suit instituted by incumbrancers has been ordered to keep down the incumbrances out of the rents, and to pay the residue to the owner of the estate, a subsequent judgment creditor may file a bill against the owner and receiver, without making the other incumbran. cers parties, to have his debt satisfied out of the surplus rents, after keeping down their incumbrances. Lewis v. Lord Zouche, 2 Sim. 388.

Creditors named as cestuis que trust of property in mortgage in a suit to redeem.

3. Trustees and cestuis que trust.—To a bill to redeem mort. gaged property which has been assigned (subject to the mortgage) to trustees for scheduled creditors, the creditors are not sufficiently represented by the trustees, where at least no reason is given in the bill for not making the creditors parties. And the defect is not supplied by bringing a few of the creditors before the court by a supplemental bill, without making the trustees parties thereto. For, if the court, for the sake of convenience, is to dispense with the presence of any of them as parties to a bill, the trustees ought to be parties to that bill, in order that they at least may be able to inform the court whether it is sufficiently framed with reference to the interests of all the cestuis que trust. Holland v. Baker, 3 Hare, 70. XIII. PARTIES TO

According to the case of Osborn v. Fallows, to a suit for the ING TO THE REredemption of a mortgage term, which the mortgagee has devised in trust for several persons, all those persons are necessary parties; although they are numerous and the property small; and although the mortgagee's will directs that the receipt of the trustees shall be a sufficient discharge to purcha- in a suit to resers. 1 Russ. & My. 741. But see the 30th order of August, 1841.

LAHON OF MORT-GAGOR AND MORIGAGEE.

decem.

To a suit for a foreclosure or a sale, persons beneficially Cestuis que trust interested under a settlement of the equity of redemption under a settlement of su equimade by the mortgagor, and standing prior to him in the limity of redemptations of such settlement, and having consequently a prior closure suit. right to redeem, are necessary parties. Anderson v. Stather, 9 Jur. 806, V. C. B.

A person cannot maintain a suit for a redemption, without Trustees of making the trustees of a charge on the estate anterior to the charge in a suit for redemption. interest claimed by him, and also (where not exempted by the 30th order of August, 1841,) the persons beneficially entitled to that charge, parties to the suit. Henley v. Stone, 3 Beav. 356.

To a bill of foreclosure, a trustee of the mortgage monies Retired trustee who has retired, but has not been freed from the trust by the of mortgage substitution of a new trustee in his room, is a necessary party, foreclosure suit. although a memorandum is indorsed on the deed by which he was appointed, expressive of the assent of the cestuis que trust to his discharge, and purporting to assign and yield up the trust monies and authorities to the co-trustees. Adams v. Paynter, 1 Coll. 592.

Trustees appointed by the mortgagor of a reversionary in. Trustees in a ? terest in stock, in trust to sell the same, and pay off the mortgage debt, and to hold the surplus for the mortgagor, are not proper parties to a bill of foreclosure. Slade v. Rigg, 3 Hare, 35.

4. Parties to mortgage suits generally .- Where the owner purchaser of an of two estates comprised in the same mortgage, afterwards estate mortgages one of them to another person, and sells the other force bear of to a third person, and then the first mortgagee files a bill of company I nihe foreclosure of the estate twice mortgaged, the purchaser of

moduler of the

SUITS PERTAIN-ING TO THE RE-GAGOR AND

Representatives of a tenant for life, in a foreclosure suit.

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Judgment crediin a foretors. closure suit.

XIII. PARTIES TO the other estate is a necessary party. Payne v. Compton and Compton v. Payne, 2 Y. & C. 457.

Where a tenant for life and a tenant in tail join in a mortgage, and afterwards in a sale of the estate, and the mortgagee files a bill of foreclosure after the death of the tenant for life, the representatives of the tenant for life must be parties to the bill, because they are entitled to some part of the purchase money. Chalie v. Gwynne, 6 Law J. (N. S.) 274. M. R.

The 23rd order of Aug. 1841, does not make it sufficient for a mortgagee in a foreclosure suit to serve a copy of the bill upon judgment creditors whose judgments were entered up subsequently to his mortgage. Adams v. Paynter, 1 Coll. 530.

XIV. Parties to Partnership Suits.* (1)

A suit for the dissolution of a partnership cannot be maintained by some of the partners on behalf of themselves and the rest. All the partners must be parties by name. Wilson v. Chester, 1 Law J. (N. S.) 126, V. C. See also cases supra, Sec. VII., p. 417.

* See Sec. 7. See note to p. 398.

(1) Partner against partner cannot blend private with partnership claims. If he is in advance for more than his partnership liabilities, he becomes a debtor to the firm to which he must look first, and lastly to the individual efforts of partner, and there is no allegation that the partner's effects are not adequate to indemnity. The advance for individual indebtedness of defendant, creates only the ordinary relation of debtor and creditor, to adjust which, a court of law is adequate. A creditor at large is not allowed to come into this court upon a purely legal claim, and enjoin his debtor from disposing of his effects. This is only when he has reduced his claim to a judgment. Freeman v. Fennall et al., 1 Smedes & Marshall, (Miss.) Ch. R. 626-7, 624.

In the case of Coe v. Whitbeck, 11 Paige's Chancery Reports, 42, 44, Chancellor Walworth remarks, that "where a debt is due to a copartnership at the time of the bankruptcy of one of the individual members of the firm, an action at law to recover the debt must be brought in the joint names of the solvent copartners, and of the assignee of the bankrupt; as the legal title to the debt is vested in them jointly by operation of law, (2 Walf. on Parties, 299.) But the solvent partners have the right to bring the action in the names of them-

XIV. PARTIES TO PARTNERSHIP SUITS.

Partners, in a suit for a disso-

Where several persons enter into a speculation, by which XIV PARTIES TO a loss is sustained, a bill by one of them against another for his proportion of the loss, without making the others parties, Partners, in a is defective for want of those parties, although the plaintiff them against allege and prove that they have settled with him, and that another for his nothing is due from or to them, to or from the defendant. loss. .Hills v. Nash, Phil. 594.

To a bill filed for the purpose of obtaining relief against surviving partthe assets of a deceased partner, the surviving partners must assist the ex-be made parties, though no decree is sought against them; censed partner because they are necessarily interested in taking the account of the amount of the joint debt. Thorpe v. Jackson, 2 Y. & C. Eq. Ex. 553.

A creditor of a partnership firm may file a bill on behalf of himself and all other creditors for payment of the partnership debt out of the estate of a deceased partner in the first instance, although there be no proof that the surviving partner is insolvent. In such a suit, however, the surviving partner is properly made a co-defendant, as being interested to contest the demands of the creditors, although the remedy against the surviving partner, is altogether at law. v. Henderson, 1 M. & K. 582.

The residuary legatees of a deceased partner, even without Surviving partcharging or proving collusion, may maintain a suit for an torof a deceased

selves and the assignees of the bankrupt, without the consent of such assignces, upon giving them an indemnity against the costs (Brown on Parties, 65; Whitehead v. Hughes, 2 Cromp. & Meeson, 318.) And in this court I think the assignee of the bankrupt co-partner is a necessary party to a suit brought to recover a debt due to the firm at the time of the bankruptcy; where such assignee takes a beneficial interest in the partnership effects, as a trustee for the separate creditors of the bankrupt co-partner under the proceedings in bankruptcy. But where the bankrupt is discharged from his debts, and it distinctly appears that the co-partnership is insolvent, so that the assignee in bankruptcy has no interest in the effects of the firm, but the solvent partners must necessarily apply the whole of the co-partnership property to the payment of the debts of the firm and make up the deficiency of those debts out of their individual property, and where that fact is distinctly stated in the bill, I can see no good reason for making the assignee of the bankrupt partner, a party to a suit in this court to obtain payment of a debt due to the firm."

account of estate ceased partner.

XIV. PARTIES TO account of his personal estate against his executors, and against a surviving partner and the executors of another departner in a suit ceased partner, where the latter have purchased the share of the first mentioned deceased partner from his executors, but of another de the partnership accounts were inaccurately taken. Law. 2 Coll. Ch. C. 41.

Representatives of a deceased to account.

To a suit in which a firm to whom remittances have been partner, in a suit made will have to account, the representatives of a deceased in which the partnership have partner are necessary parties. Miller v. Crawford, 9 Law J. (N. S.) 193, L. C.

Insolvent co-

One partner may file a simple bill for a contribution in repartners, in a bill for contribu- spect of an over payment by him, and not for an account against some of his co-partners, without making insolvent partners parties to the suit. Jones v. Morgan, 10 Jur. 238.

XV. PARTIES TO SUITS BY OR AGAINST TEN-ANTS IN COMMON OF REAL OR PER-SONAL ESTATE.

XV. PARTIES TO SUITS BY OR AGAINST TENANTS IN COMMON OF REAL OR PERSONAL ESTATE.*

V mon and trustee of outstanding tenant in common.

Where one of two tenants in common files a bill for the recovery of his share against a person who threatens and in-Tenant in com- tends to set up an outstanding term so as to prevent him from succeeding in an action of ejectment commenced by him, the term, in eject-ment bill by ano- other tenant in common is a necessary party, if the bill prays that an account may be taken of the rents and profits received by the defendant, and that the defendant may deliver up the title deeds; but the trustee of the term need not be a party. Brookes v. Burt, 1 Beav. 106.

Person entitled to a share of a no breach of trust.

A bill may be filed for the moiety of a legacy by one of two legacy or fund, persons entitled to the legacy, without making the other lega-in a suit by another person for tees a party. Hughson v. Cookson, S Law J. (N. S.) Ex. R. where there is 68.

> Where a sole surviving executrix, who is beneficially interested in a moiety of her testatrix's estate, files a bill against a person who has received part of that estate abroad, the representatives of the person beneficially interested in the other moiety must be before the court. But it will be considered sufficient (at least, if not objected to until the hearing) if such sole surviving executrix takes out administration in the prerogative court to the party interested in such other moiety

> > * See Sec. 7. See note to pp. 398, 399.

although that party left a will which has been proved in a XV. PARTIME TO SUITS BY OR AGAINST TENforeign country. Price v. Dewhurst, 6 Law J. (N. S.) 226, V.C.

OF REAL OR PER-

In Hutchinson v. Townsend, Lord Langdale, M. R., on the authority of Smith v. Snow, 3 Mad. 10, held that a person entitled to one-fourth of an ascertained and appropriated fund. vested in a trustee, may sue for his one-fourth share without making the parties entitled to the other three fourths parties to the suit; although his lordship said it would be very inconvenient to encourage suits of this description. To deal with a fund in parts would occasion a multiplicity of suits. 1 Keen. 675.

According to the case of Alexander v. Mullins, where an Person entitled executor neglects to make an investment to answer a legacy trust fund in a to certain persons, and dies, one of the legatees cannot proof trast. instituted by anothceed against his assets for his own share, without suing on the person enti-behalf of himself and the other legatees, or making the other share. legatees parties; for a person having an interest only in a portion of a debt, cannot maintain a bill for the recovery of his share, without suing in that way. 2 Russ. & My. 569. And according to the case of French v. Cockerell, one of two persons who are entitled in moieties to a trust fund, cannot file a bill for a misfeasance as to the whole fund, without making the other a party; for otherwise the defendants would be subject to a second suit. 8 Sim. 219. But according to the case of Perry v. Knott, a suit may be maintained for a breach of trust in respect of an ascertained fund, by a party entitled to a moiety thereof, without making the person entitled to the other moiety thereof a party. 5 Beav. 293.

Where a testator bequeaths certain sums to two persons, upon trust to appropriate and apply the same, in two equal parts or shares to be divided, for their children respectively, the fund is so divided into distinct parts, as to make it unnecessary for a plaintiff filing a bill in respect of a breach of trust as to one part only to bring the parties interested in the other before the court. Oheston v. Banister, 4 Beav. 205.

XVI. PARTIES TO TITHE SUITS Crews of oys-

ter boats.

XVI. PARTIES TO TITHE SUITS. (1)

To a bill for the tithes of oysters customarily paid by the proprietors or occupiers of oyster-boats, the crews of the boats are not necessary parties, although they are paid a certain sum for a given number of oysters taken: for it is not considered that they have any interest in the fish themselves, but that they are paid wages proportional to the number of fish they take. Perrott v. Bryant, 2 Y. & C. Eq. Ex. 61.

Impropriator, in a suit by the vicar

To a bill for tithes by a vicar against the occupiers, the impropriator ought not to be a party, although the bill alleges that the tithes in question have always been received by the impropriator. Cook v. Blunt, 2 Sim. 417.

Landowner.

Where in a bill for tithes it is charged that the landowner has documents in his possession which would support the plaintiff's case, the plaintiff may make him a party to it, for the purpose of discovering from him such documents. the plaintiff in a suit which does not seek the establishment of a right to take tithe need not make the landowner, as well as the occupier, a party, unless he chooses; and if he does choose to make the landowner a party, he does it at the hazard either of not receiving his costs, although he should get a decree against the occupier, or of paying them, according to the circumstances of the case. Day v. Drake, 3 Sim. 64, 72.

Vicar, in a suit by an impropri-ate rector. 430

In a suit by an impropriate rector for an account of tithes, and not to establish a right to take tithes, when the defence is that the tithe in question is vicarial, and the vicar, who is a defendant, dies during the suit, it is not necessary to make the new vicar, as well as the executor of the former vicar, a party, if the plaintiff will waive the account subsequent to his induction. Daws v. Bean, Jac. 95.

XVII. PARTIES TO SUITS PERTAINING TO THE RELATION OF TRUSTEES AND CESTUI QUE TRUST. # (2)

TEE AND CESTUI QUE TRUST

1. Author of a trust and his representatives.—To a bill for XVII.PARTIES TO SUITS FERTAIN. the execution of a trust, the representatives of the donor are larton of Trus-

* See note to p. 398.

⁽¹⁾ The wife of a husband, tenant in common, is not a necessary party to a suit for partition. Mathews v. Mathews, 1 Edw. Ch. R. 565.

⁽²⁾ In the case of Christie v. Herrick, 1 Barb. Ch. R. 260, Chancel-

not necessary parties, although on the face of the bill it ap- NVIII about to pears somewhat doubtful whether a valid trust was created. 186 1 1 Reed v. O'Brien, 7 Beav. 32.

lor Walworth remarks, that "the general rule unquestionably is, that all persons materially interested in the subject matter of the suit ought at the second materially interested in the subject matter of the suit ought to be made parties; and that the cestui que trust, as well as the trustees, tion that should be brought before the court, so as to make the performance of the decree safe to those who are compelled to obey it, and to prevent the necessity of the defendants litigating the same question again with other parties. But the case of assignees, or other trustees of a fund for the benefit of creditors, who are suing for the protection of the fund, or to collect moneys due to the fund from third persons, appears to be an exception to the general rule, that the cestui que trust must be made a party to a suit brought by a trustee. Lord Redesdale says, trustees of real estate for the payment of debts or legacies, may sustain a suit either as plaintiffs or defendants, without bringing the creditors or legatees before the court, which in many cases would be almost impossible; and the rights of the creditors or legatees will be bound by the decision of the court against the trustees, (see supra.) And in Franco v. Franco, 3 Ves. Jr. R. 76, where one trustee filed a bill against another, to compel him to replace stock, belonging to the trust fund, which he had improperly sold, Lord Rosslyn overruled a demurrer, which had been filed by the defendant, upon the ground that the cestui que trust, to whom the proceeds of the trust fund were ultimately to be paid, were not made parties. So in the case of Bifield v. Taylor, 1 Molloy's Ch. R. 193; Beatty's Ch. R. 91, S. C., where a bill was filed by the trustee to raise the arrears of an annuity which had been granted to him in trust for himself and four other persons, Lord Chancellor Hart overruled the objection of the defendant that the cestui que trust were not made parties to the suit; it appearing to have been the intention of the parties creating the trust, to give to the trustee the power to collect and receive the amounts for himself and the other parties interested therein with him, without the necessity of their interference."

It is not necessary in all cases, that the cestuis que trust, or parties beneficially interested should be parties to a bill in equity. Executors and administrators, (for instance) who may be sued or who may sue, in many cases sufficiently represent credit rs, legatees or distributees for whom they are trustees. Lucas v. McBlair, 12 Harr. & Johns. (Maryland.) R. 1.

It is the constant aim of a court of equity to do complete justice, by

XVII. PARTIES TO TRUSTEE AND CESTUI QUE TRUST

Personal repre-sentative of the author of a trust in a suit by a trustee against his agent.

And to a suit for an account against a person who has mana-SUITS PERTAIN-ING TO THE RE- ged trust property for a trustee, the personal representative of the testator who created the trust is not a necessary party. Bradstock v. Whatley, 7 Jus. 409, M. R.

> deciding upon and settling the rights of all parties interested in the subject matter of the suit, but this may be obtained by having the necessary parties before the court, at any time before the final decree is passed. If all persons interested are not made parties, the court many times, upon hearing, will not for want of parties, proceed to a decree. Ibid.

> If a trustee employs an agent to bid for him at his own sale, and he does bid, and the property is struck off and conveyed to him, and then re-conveyed to the trustee in pursuance of the previous agreement between the agent and the trustee, in a bill in equity to set aside both of those deeds, it is unnecessary to make the agent or his representative a party. Davis v. Simpson, 5 Harr. & John. R. 147.

> All the devisees are necessary parties to a suit against the executors respecting real estate which was devised to them in trust to sell, and was inequitably purchased by one of them. Campbell v. Johnston, 1 Sand. Ch. R. 148.

> Where no trustee of a wife is appointed in an ante-nuptial marriage settlement, a court of equity will treat the husband as trustee. Blanchard v. Blood, 2 Barb. S. C. Rep. 352.

> Where a trustee prosecutes a claim for the benefit of the cestui que trust the latter must be made a party. Fish v. Howland, &c., 1 Paige's Ch. R. 20. Where the complainant claims in opposition to a deed of trust, and seeks to set it aside on the ground of fraud, he may proceed against the fraudulent trustee alone, without making the cestuis que trust, parties. It is otherwise where the complainant is endeavoring to enforce a claim adverse to the interests of the cestui que trust, but which is founded upon the supposed validity of the trust deed. Rogers v. Rogers, 3 Paige's Ch. R. 379.

> A proceeding against trustees for a fraudulent breach of trust, is an exception to the rule, that in a suit against trustees, all of the trustees must be made parties. Cunningham v. Pell, 5 1 aige's Ch. R. 607. When real estate is conveyed by a trust deed to secure the cestui que trust, he may proceed in equity to foreclose the trust, and other creditors who have levied their executions on the trust estate are entitled to redeem, and therefore are proper parties defendants to the bill of foreclosure. Marriott v. Geven, 8 Alabama R. 680. In a bill for the specific performance of a trust deed, all persons who claim the specific fund in the same right, may properly be made parties. Partee v. McAllister, 6 Humphreys' Tenn. R. 408.

When the maker of a promissory note places the money XVII.PARTIES TO thereby secured in settlement upon another person, the cestui ING TO THE TE. que trust may sustain a suit against the trustee, seeking to af. TRUSTEE AND fect him with a breach of trust in improperly allowing the money to remain outstanding, and to compel him to pay the money, without seeking to recover the money from the represent of the mater of a note. In a cut tatives of the maker of the note, or making them parties. against attrastice Platel v. Cradock, C. P. Cooper. 481, V. C. E.

Where the legal title to trust property is in the trustees, so that a decree directing a sale of the property either by the trustees or by a receiver, will give a good and valid title to a purchaser, if the cestuis que trust are numerous, or if some of them are unknown, it is not necessary to make them all parties to a bill to compel the execution of the trust, and for an account and distribution; but a part may sue in behalf of themselves and others. And the court will see that the rights of all to their distributive shares of the trust fund are protected by the decree in the cause. Mann v. Butler, 2 Barb. Ch. R. 362.

The general rule is that a nominal trader must join the beneficiaries. But where the cestuis que trust are numerous, and great inconvenience or necessary expense would accrue to complainant to bring them in, the court will in its discretion dispense with the general rule. Morris Canal and Banking Co., 3 Green Ch. R. 377.

Cestuis que trust having a vested interest though no right of present enjoyment, may file a bill to have the trusts declared and the defendant removed from his trust if he has misbehaved. Cooper v. Day, in Error, 1 Richardson Eq. Rep., (S. Caro.,) 38, 26.

In general a bill is not evidence against the plaintiff, the statement being attributed to the counsel, not to the party. But Chan. Johnston (S. Caro.) said he was in the habit of ruling, that any paper signed by a party, much more sworn to by him, is good as his statement. Cooper v. Day, in Error, 1 Richardson Eq. Rep. 34, 26.

Where the bill seeks the title in behalf of persons having the equity to land against the trustee, all interested in the equity should be parties, and if not, those not parties are not affected by the doctrine of lis pendens so as to prevent them from perfecting their equitable right by the acquisition of the legal title. Lessee of Trimble v. Boothby et al.. 14 (Griswold's) Ohio Rep. 109; Gibler et al. v. Trimble, id. 323.

In bill against trustees of an incorporated religious society to restrain them from ejecting a clergyman from the parsonage and deprive him of the right to preach, the chancellor was induced to think that the corporation should be party. Lowyee v. Cipperly, 7 Paige R. 282, 281. XVII. PARTIES TO SUITS PERTAIN-ING TO THE RE-LATION OF TRUSTIPE AND CESTUL QUE TRUSTIPE AST.

Trustee who has not acted.
A trustee, in a suit against co-trustees who have improperly sold the trust property.

Trustees of a settlement, in a suit by their cestuis que trust against the trustees of a former settlement.

Trustees of a term and portionists, in a suit for the appointment of new trustees.

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Personal representatives of a trustee, in a suit for an account of receipts of trustees.

Personal representatives of a deceased cotrustee in a suit for a recovery of property constituting an indemnity to the trustees.

2. Trustees and their representatives.—A person who has accepted a trust merely by executing a deed appointing him a new trustee, but has never acted, is not a necessary party to a suit against trustees for a breach of trust. Wilkinson v. Parry, 4 Russ. 274.

Where two out of three trustees of a lease belonging to a club improperly sell it, the third is not a necessary party to a suit for an account of the purchase money and for winding up the affairs of the club. Richardson v. Hastings, 7 Beav. 301.

Where a fund is lost in consequence of not being transferred from the trustees of one settlement to the trustees of a subsequent settlement, the cestuis que trust under the second settlement may file a bill in respect of the loss, without making the trustees of that settlement parties, because the cestuis que trust represent the trustees. Munch v. Cockerell, 8 Sim. 219.

To a bill for the appointment of new trustees for preserving contingent remainders, the trustees of a term for raising portions which is prior in point of limitation to the estates of the trustees to preserve contingent remainders, are necessary parties: but the portionists are not indispensable parties. *Ellison* v. *Cookson*, 2 Coll. 52.

Where a bill is filed for an account of personal estate received by trustees, a person who has obtained administration of the estate of one of them "for the purpose only to attend, supply, substantiate, and confirm the proceedings in the suit," is not sufficient to represent the deceased trustee: a person who represents his personal estate generally must be brought before the court. Clough v. Dixon, 10 Sim. 564.

To a suit for the recovery of property deposited with trustees as an indemnity to them against a supposed breach of trust, the representative of a deceased trustee is a necessary party, because if it is the case that a breach of trust was committed, the estates of both the trustees are liable, and therefore the representative of the deceased trustee is interested in upholding the indemnity. Meinertzhagen v. Davis, 7 Jur. 1103, V. C. B.

Trustoes, in the case of a joint demand on By the 32nd order of August, 1841, "in all cases in which the plaintiff has a joint and several demand against several

persons, either as principals or sureties, it shall not be neces. XXIII FMTH + 19 sary to bring before the court, as parties to a suit concerning the to the base such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."

This order renders it unnecessary in a suit for a breach of order ist to bring all the parties to the large large of last trust to bring all the parties to the breach of trust before the court. (The Att. Gen. v. The Corporation of Leicester, 7 Beav. 176:) and indeed, a suit may be instituted against one of them alone. Kellawny v. Johnson, 5 Beav. 319. On this subject, see also Att. Gen. v. Wilson, Cr. & Phil. 1; and Seddon v. Connell, 10 Sim. 79.

The 32nd order extends to the simple case of a demand on executors jointly implicated in a breach of trust. Perry v. Knott, 4 Beav. 179: 5 Beav. 293. But it does not apply to an administration suit. So that where executors commit a breach of trust, and one dies before any suit is instituted, his personal representatives are necessary parties to a suit instituted for an administration of the testator's estate, and for relief in respect of such breach of trust. Hall v. Austin, 10 Jur. 452. See also Biggs v. Penn, 4 Hare, 469; and observations thereon, 4 Hare, 624.

And where real property is left to trustees upon trust for one of them for life, subject to charges incident thereto, and that party is suffered by the others to receive the rents and profits, without satisfying such charges in the manner directed, a suit cannot be instituted for the breach of trust against such others of them alone, notwithstanding the 32nd order. Shipton v. Rawlins, 4 Hare, 619.

2. Tenant for life.—And where executors transfer a stock Toler to into the joint names of one of them and of the tenant for life with the of the stock, and, on the death of that executor, the tenant for life sells out the stock, and applies it to his own use; in such case, although under the 32nd order a bill may be filed against any one of the executors singly in respect of the first breach of trust in transferring the stock; yet the tenant for life, or his representative, is a necessary party, in asmuch as he is the party, or the representative of the party, by whom the first breach of trust was made an occasion of actual loss to the other parties beneficially interested .- Perry v. Knott, 5 Beav. 293.

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XVII.PARTIES TO BUITS PERTAIN LATION OF TRUSTEE AND CESTUI QUE TRUST.

Cestuis que trust, in a suit by a trustee against his co-trustee. Cestuis que trust, in a suit by the representatives of a trustee against surviving co-trustees. Cestuis que trust, in a suit to recover the trust securities. Cestuis que trust, in a suit to set aside a settlement.

Cestuis que trust of a sum secu-red by a policy.

Next of kin, to whom, as cestuis trust. perty is limited. 433

Cestuis que trust represented un-der the 30th or-

der of Aug. 1841.

4. Cestuis que trust.—A trustee may file a bill against his ING TO THE RE- co-trustee, to recover the trust fund, without making the cestuis que trust parties. May v. Selby, 1 Y. & C. Ch. C. 235. And to a suit instituted by the representatives of a deceased trustee against surviving co trustees for a contribution towards making good a loss occasioned by a breach of trust, the cestuis que trust are not necessary parties. Robinson v. Evans, 7 Jur. 738, V. C. W. And a suit may be maintained by a trustee against one of several cestuis que trust, to recover the trust securities, without making the other cestuis que trust par-Bridget v. Hames, 1 Call. 72.

Where a suit is instituted by creditors to set aside an assignment made by a father to a trustee for his children, they must be defendants, although they were not parties to the assign-Tenchard v. Finch, 4 Law J. (N. S.) 177, M. R.

To a bill by a trustee of a sum secured by a policy of assurance, to compel the person on whose life the policy was effected, and who had fraudulently surrendered it, to pay the amount assured, the cestuis que trust are necessary parties, in a case where, if they were dead, the person, so surrendering the policy would have been entitled to the benefit of the policy. Fortescue v. Barnett, 2 Law J. (N. S.) 98, V. C.

Where property is bequeathed in favour of a person for life, and after his death to such persons as shall then be the next of kin of the testator, and a bill is filed for the appointment of new trustees, the next of kin of the testator at the time of filing the bill are necessary parties. Wardell v. Claxton. 1 Y. & C. Ch. C. 265.

(As to cestuis que trust of a prior term, see Ellison v. Cookson, supra, p. 431.)

By the 30th order of August, 1841, (1) "in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in

⁽¹⁾ This rule has been adopted by the Supreme Court of the United States. See 49th of the Equity Rules Sup. Ct. U. S., Jan. T., 1842.

S. XVII. NOTE ON PARTIES.

the same manner, and to the same extent, as the executors or XVII. Parties to administrators in suits concerning personal estate represent ING TO THE REthe persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit. But the court may upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties."

CETILI QUE TRUFT.

Trustees may represent the persons beneficially interested, in the proceeds of an estate under this order, although there is no clause in the will empowering the trustees to give discharges. Savory v. Barber, 4 Hare, 125. And they may do this even where the suit is by some of the persons beneficially interested, and where their conduct is impeached in several particulars. Osborne v. Foreman, 2 Hare, 656.

But this order does not apply to a case in which the equitable interest only is vested in trustees by demise, although they are empowered to give discharges for the proceeds. v. Hind, 12 Sim, 414.

The order applies to those cases in which trustees have a present absolute power to sell real estate, and not to cases where they have no power to sell, except with the consent of another person. Lloyd v. Smith, 13 Sim. 457.

Nor does it apply where the bill asks that the whole of the testator's real and personal estate may be administered. ler v. Huddleston, 13 Sim. 467.

4. Other Parties.—Where a trustee of personal property Person joining belonging to a club improperly sells it, and another member process properof the club joins in the receipt for the money, but does not re- sold by a trustee. ceive any part of it, he (the latter) is not a necessary party to a suit against such trustee in respect of the sale. v. Hasting, 7 Beav. 301.

Where some of the plaintiffs in a suit for carrying the trusts of a will into execution mortgage their equitable interests pen- Mortgage of ding the suit, the mortgagee is a necessary party. Solomon v. rest. Solomon, 13 Sim. 516.

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XVIII. PARTIES TO SUITS BE-TWEEN VENDOR AND PURCHASER.

XVIII. PARTIES TO SUITS BETWEEN VENDOR AND PUR-CHASER.* (1)

1. General rule.—To a common bill for a specific performance the parties to the contract are in general the only proper parties. Wood v. White, 4 M. & C. 469.

* See Sec. VI.

(1) Although a person purchases premises subject to a mortgage, and assumes (as between the seller who originally gave the mortgage and himself) the payment of the mortgage debt, as a part of the purchase money, and afterwards conveys the premises to another in like manner subject to the mortgage, he is not a proper party to a bill of foreclosure, there is no sufficient covenant or privity of contract between him and the holder of the mortgage to make him liable for any deficiency upon the sale. Lockwood v. Benedict, 3 Edwards' Ch. R. 472.

No decree can be had against a purchaser without notice of a lien, unless his vendor, who was a purchaser with notice, be made a party. Singleton v. Gayle, 8 Porter's Ala, R. 271.

On a bill filed by vendee for rescission of a contract for the purchase of a tract of land, if it appear that vendee has aliened and delivered possession of the land to another, such alienee must be made a party before any decree for rescission can be pronounced. Yoder v. Swearingen, 6 J. J. Marsh, Ky. R. 519.

A bill either to rescind or to enforce the specific execution of a contract for the sale of land, cannot be sustained against one who had guaranteed the contract, without making the principal vendor or his representative a party. Oliver v. Dix, 1 Dev. & Battle, N. C. R. (Eq.) 158.

Where it is sought to vacate a sale of real estate, the purchaser, or in case of his death his heirs, ought regularly to be parties to the cause. *Buchanan* v. *Torrance*, 11 Gill & John. (Maryland) R. 342.

The heirs of the vendee are necessary parties after his death, in a bill filed by his assignee against the vendor, for a specific performance. Lord v. Underdunck, 1 Sand. Ch. R. 46.

The vendor of land must be made a party to a bill in chancery enjoining the purchase money for a defect of title, notwithstanding the sale was made by an agent, the agent took the bond for the purchase money payable to himself, and is made a party. Sweet's heirs, &c. v. Briggs, 5 Littell's Ky. R. 18.

A purchaser under contract, who enters into actual possession of lands, in pursuance of the terms of agreement, makes improvements, &c., should be made a party to a bill in equity filed to avoid the title of his vendor, so that the court may make such order in the premises as will be just and equitable in reference to the rights of all concerned.

2. Purchaser and his trustees and representatives, &c. - Where XVIII PARTIES two houses, held under one lease, are sold in separate lots; were therefore and it is stipulated that the purchasers shall be parties to each other's assignment, the purchaser of the one lot, if ready to the lot is not a necessary to the lot is not a necessary to the lot. party to a suit for the specific performance of the purchase of the purchase that lot. Paterson v. Long, 5 Beav. 186.

But to a bill by a purchaser for a specific performance of Purchaser of a contract for sale of one lot, the purchaser of another lot, which at the time of the sale was agreed to be augmented with a part of the former lot, is a necessary party; because, it would be improper to leave the vendor exposed to another suit by the purchaser of the lot agreed to be augmented. Mason v. Franklin, 1 Y. & C. Ch. C. 243.

Where trustees for sale of leaseholds file a bill against the Purch ser, in a Indlord to oblige him to give his license to the assignment of bad of the ave the premises to a person to whom they have been sold, the sign purchaser is a necessary party; because, if he were not made a party, the landlord might be harassed with another suit for the same purpose by the purchaser. Maule v. The Duke of Beaufort, 1 Russ. 349.

"The original vendee of an estate is not a necessary party to a bill against his assignee for a specific performance of an

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If he is not made such party, and a decree is obtained avoiding the title of his vendor on a bill filed by a creditor of the grantor of the vendor and such creditor becomes a purchaser of the legal estate of his debtor, at a sheriff's sale, under an execution on the judgment in his favor, and brings ejectment for the recovery of the land, he is not entitled to recover. Park v. Jackson, 11 Wendell's R. 442.

Where the vendor is dead all his heirs at law should be parties to a bill to set aside the sale on the ground of fraud upon the part of the vendee. Livingston v. The Peru Iron Co. and others, 2 Paige's Ch. R. 390.

If the vendor makes a subsequent conveyance, while the fraudulent vendee is in actual possession, claiming the land under his prior purchase, the subsequent conveyance is inoperative, and a suit to set as dethe first sale must be brought in the name of the vendor, or his legal representatives if he is dead. Ibid.

The plaintiff who seeks a legal title from one who had notice of his equity, must make the person a party from whom his equity is derived and who might be affected by the decree. Smith v. Shine of Meigs, 1 McLean R. 22, 31.

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Person for whom a purchase was made.

Cestuis que trust claiming under a purchaser, in a suit for a conveyance from the vendor.

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Heir and personal representative of a purchaser who has resold pending a suit for setting aside the purchase.

Heir of a vendor, in a suit by his administrator for specific performance.

Widow, in a suit to rescind a contract for a sale of her estate by her husband.

Mortgagee and tenant for life, in a suit for specific performance. agreement to purchase." Hall v. Lever, 3 Y. & C. Eq. Ex. C. 191.

Where a bill for a specific performance is filed by a vendor against a person who disclosed to the vendor that he made the purchase for his trustee, the trustee must be a party to the suit. Wynniat v. Lindo, Taml. 512.

To a bill by a trustee of property against the vendor thereof for a conveyance, the persons in trust for whom it was limited to such trustee by the purchaser are necessary parties. Josting v. Karr, 3 Beav. 694.

Where a bill is filed to set aside a conveyance made to the defendant, and the defendant makes a conveyance and lease pendente lite, his heir is a proper party to a supplemental bill against the purchaser and lessee; because his heir ought to join in the reconveyance; and his personal representative is also a proper party, because the plaintiff is entitled to an account of the rents which the defendant might have received, if the lands had not been sold or leased. Trevelyan v. White, 1 Beav. 588.

3. Other parties to suits between vendor and purchaser.—
The heir at law of the vendor of real estate is a necessary party to a suit by the administrator of the vendor against the purchaser for specific performance of the contract, even though the legal estate is outstanding in a trustee. Roberts v. Marchant, 1 Hare, 547.

Where a husband, who is seised of an estate in right of his wife, contracts to sell it, as if it were his own; and his wife, even if after his decease she could adopt the contract and enforce a specific performance thereof, does not attempt to do so, she is not a necessary party to a bill of revivor filed by the purchaser against the husband's executor to rescind the contract on the ground of fraud. Humphreys v. Hollis, 1 Jac. 73.

Where a bill for a specific performance is filed by a person who has contracted to purchase the absolute legal and equitable interest in a mortgaged estate from a person who claims to be entitled to the equity of redemption, the mortgagee, who has not joined in the contract, must not be made a defendant; because he has no interest in the specific performance of the contract: the performance of it cannot affect

his security or interfere with his remedies: the purchaser is XVIII. PARTIES his security or interfere with his remedies: the purchaset is not entitled to redeem until the completion of the contract, TWEEN VEN and then the mortgagee is not at liberty to dispute his title, or to withhold the estate on repayment of the mortgage money. Nor in such case can a person who claims a life estate in the equity of redemption, but has not joined in the contract, be made a defendant, though the mortgagee is not willing to convey to the purchaser without having competent authority for so doing: for, as we have seen, the general rule is, that to a bill for specific performance, the parties to the contract are the only proper parties; and there is no ground for departure from the general rule in this case. Tasker v. Small, 3 My. & C. 63. See also Hall v. Lever, 3 Y. & C. Eq. Ex. 191, and White v. Wood, 4 My. & C. 460.

If a purchaser of a copyhold estate re-sells it before it is Mortager of a surrendered to him, and thereupon the first vendor agrees to necessary party surrender it to the second yendee; and then the second vendee borrows money and agrees to surrender the copyhold to the lender by way of mortgage, who gives notice of such agreement to the first vendor, and requires the surrender to be made to him (the mortgagee), the latter is not a necessary party to a bill filed by the second vendee against the first vendor, praying a surrender to be made to him, the second vendee. - v. Walford, 4 Russ. 372.

In a suit for the specific performance of a covenant to pay Payor . a a suit a sum of money to a person for the use of the plaintiff, and to torusance secure an annuity by a charge on real estate, the person to lacer many whom the money is covenanted to be paid, and incumbrancers of perform on the real estate whose incumbrances are alleged to have have alleged been created in fraud of the plaintiff, are necessary parties. The plaintiff, are necessary parties. Paterson v. Wellesley, 6 Law J. (N. S.) 190, V. C.

A man who after going through the marriage ceremony A person reson with a woman, joins with her as her husband in assigning her ter of ans and interest in a trust fund, but was at that time married to ano. ther woman, is not a necessary party to a suit for the benefit of such assignment. Sturge v. Star, 2 M. & K. 195.

A person is not a necessary party merely because one ob- To-at the first ject of the bill is to restrain an act by which he is affected. So be a control of that where a bill is filed by a vendor for a specific performance and to restrain a trespass by the purchaser in the mean time,

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Third party to an agreement.

the tenant, not being a party to the purchase contract, is not TO SUITS BE-TWEEN VENDOR a necessary party to the suit. Robertson v. The Great Western Railway Company, 10 Sim. 314.

According to the case of Greathed v. The London and South-Western Railway Company, the court will not by way of injunction enforce a distinct subsidiary part of an agreement between two parties in the absence of a third party to the agreement, and without giving relief in respect of the whole of such agreement. 10 Jur. 343.

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